Petition

No. 81-187

Office-Supreme Court, U.S.
FILED
JUL 24 1981
STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

ALF KEY, ROSCOE KEY, JR., PAUL KEY,
TOM KEY, JR., LOUISE KEY MASON,
GEORGIA KEY BOLDEN, WALDO H. HERMAN,
GILBERT JOHNSON JR., PETER ANDREW KEY,
and JOE ALFONZIA KEY, Petitioners,

v.

MRS. LOUISE P. WISE, LOUIS WISE, AMY WISE
PERMENTER, FANNIE WISE KORTJOHN,
VIRGINIA C. WISE, DR. LOUIS J. WISE,
LOUIS PAUL FISCHER, EUGENIA FISCHER,
MAX J. HEINBERG III, MRS. PAULINE
HEINBERG GAGLIANO, CHARLES E.
HEINBERG, WILLIAM W. HEINBERG,
MRS. EUGENIA F. HEINBERG, and
THE UNITED STATES OF AMERICA,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

C. M. MURPHY
Counsel for Petitioners
524 Melody Lane
Memphis, Tennessee 38119
Telephone 901-683-0788

QUESTIONS PRESENTED FOR REVIEW

In a suit by plaintiffs against the United States and named civilian defendants to quiet title to 451 acres of land, brought in the United States District Court where the land is located, and which land the United States has at all times material claimed an interest therein: and (1) wherein Public Law 92-562, 92nd Congress, S 216, Oct. 25, 1972 gives consent for the United States to be sued in such cases, but expressly provides that the United States District Court shall have exclusive original jurisdiction to hear and determine such cases; (2) and wherein the U.S. District Judge found jurisdiction, but entered an order of abstention allowing the civilian defendants to within 90 days file suit in state court to quiet the title to said property, because "the state law questions regarding titles to real estate predominate in this case;" and (3) wherein the civilian defendants did within 90 days file a state court suit to quiet title to said land, but did not make the United States a party to said state court action; and (4) wherein the state courts, trial and appellate, quieted title in the civilian defendants; and (5) wherein the state court suit did not come up to the standards of federal court suits:

Is the state court determination of its jurisdiction over the quiet title isues conclusive upon plaintiffs' original federal court suit, in the face of the Fifth Circuit holding that the District Court never should have abstained in the first place.

TABLE OF CONTENTS

TABLE OF AUTHORITIES ---------------------------- iii
OPINIONS BELOW ------------------------------------ 1
JURISDICTION --------------------------------------- 2
FEDERAL STATUTES INVOLVED ------------------- 2
STATEMENT OF THE CASE ------------------------- 2
BASIS FOR FEDERAL JURISDICTION IN FIRST INSTANCE -------------------------------- 7
REASONS FOR GRANTING WRIT ------- 7
UNFAIRNESS OF AND INADEQUACY OF STATE COURT PROCEEDINGS ------- 8
RES JUDICATA -- 16
CONCLUSION --- 23
APPENDIX -- 24
  Complaint -- 24
  Motion to Dismiss (Wise Defendants) ------------ 30
  Motion to Dismiss (Government) ----------------- 31
  Supplemental Motion to Dismiss (Wise) --------- 33
  Public Law 92-562 ------------------------------- 36
  Opinion on Motions for Dismissal --------------- 39
  Order on Motions for Dismissal ------------------ 40
  Amendment to Original Complaint --------------- 42
  Motion to Reconsider ----------------------------- 43
  Amendment to Motion to Reconsider ------------ 45
  Order (on Motions to Reconsider) ---------------- 46
  Order by Fifth Circuit Dismissing Appeal -------- 47
  Findings (Mississippi Chancellor) ----------------- 48
  Final Decree (State Court) ------------------------ 51
  Petition for Writ of Mandamus in Fifth Circuit ----------------------------------- 55

Order Denying Petition
for Writ of Mandamus ---------------------------- 64
[illegible]der Denying Rehearing -------------------------- 65
Notice of U.S. Supreme Court
denying Certiorari ---------------------------------- 66
Opinion of Mississippi Supreme Court ----------- 67
Motion of Wise to Dismiss
Federal Court Suit -------------------------------- 70
Affidavit as to Prejudice of Mississippi
Trial Judge (Chancellor) -------------------------- 72
Motion of Plaintiffs to Decide Issues on
State Court Record -------------------------------- 75
Opinion of District Court
Dismissing Complaint -- -------------------------- 81
Judgement Dismissing Complaint ----------------- 82
Opinion, Fifth Circuit ------------------------------ 83
Order on Petition for Rehearing and
Rehearing En Banc ------------------------------ 125
CERTIFICATE OF SERVICE ------------------------126

TABLE OF AUTHORITIES

CASES

Arizona v California, 298 US 558, 80LEd 1331, 56 SCt 848 --10

Brown v Felsen, 442 US 127, 60 LEd2d 767, 99 SCT 2205 (1979) ---------------------------22

Bigland v Rawles, 247 Miss 226, 153 So2d 665 ------13

Byrd v Byrd, 193 Miss 249, 7 So2d 551, 8 So2d 510 --13

California v Arizona, 440 US 59, 59 LEd2d 144, 99 SCt 919 (1979) --------------------------16

Colorado River Water Cons. Dist. v U.S., 424 US 800, 47 LEd2d 483, 96 SCt 1236 (1976) --------------------------------------21

Cox v Richardson, 186 Miss 576, 191 So 99, 124 ALR 1138 -----------------------------------12

Durfee v Duke, 375 US 106, 11 LEd2d 186, 84 SCt 242 (1963) -------------------------------18

E.L. Bruce v Smallwood, 188 Miss 771, 196 So 227 --12

Ellerd v Logan(Miss), 39 So2d 485 ------------------13

England v Louisiana Medical Examiners, 375 US 411, 11LEd2d 440, 84 SCt 461 (1964) ------------14,20

Grant v Montgomery, 193 Miss 175, 5 So2d 491 ----12

Hamner v Yazoo-Delta Lbr. Co., 100 Miss 349, 56 So 466 — 13

Heidelberg v Duckworth, 206 Miss 388, 40 So2d 179 — 12

Hooper v Walker, 201 Miss 158, 29 So2d 72 — 13

James v Tax Inv. Co., 206 Miss 605, 40 So2d 539 — 11

Johnson v Zerbst, 304 US 458, 82 LEd 1461, 58 SCt 1019 — 16

Kalb v Feuerstein, 308 US 433, 84 LEd 370, 60 SCt 343 (1940) — 17

Leavenworth v Claughton, (Miss), 19 So2d 815 — 12

Leech v Masonite Corp, 219 Miss 176, 68 So2d 297 — 9

Lyebrook v Hall, 73 Miss 509, 19 So 348 — 11

McClelland v Carland, 217 US 268, 54 LEd 762, 30 SCt 501 (1910) — 19

McGee v Holmes, 63 Miss 50 — 11

Montana v United States, 440 US 147 59 LEd2d 210, 99 SCt 970 (1979) — 14

Moore v Dempsey, 261 US 86, 67 LEd 543 43 SCt 265 — 16

Nashville & D.R. Co. v Orr, 18 Wall 471 21 LEd 810 — 10

Neal v Teat, 240 Miss 35, 126 So2d 124 ---------- 13

Newman v J.J. White Lbr. Co., 162 Miss 581, 139 So 836 ---------- 13

Paepche-Leicht Lbr. Co. v Savage, 137 Miss 11, 101 So 709 ---------- 9

Perkins v White, 208 Miss 157, 43 So2d 897 ---------- 11

Roebuck v Bailey, 176 Miss 234, 166 So 358 ---------- 11

Russell Investment Co. v Russell, 182 Miss 385, 178 So 815 ---------- 13

Smith v Anderson, 193 Miss 161, 8 So2d 251 ---------- 12

Smith v Denny, 90 Miss 434, 43 So 479 ---------- 9

Smith v Myrick, 201 Miss 647, 29 So2d 924 ---------- 13

State v Butler, 197 Miss 218, 21 So2d 650 ---------- 13

Thermtron Products, Inc. v Hermansdorfer, 423 US 336, 46 LEd2d 542, 96 SCt 584 (1976) ---------- 19

Trigg v Trigg, 233 Miss 84, 101 So2d 507 ---------- 13

Warren v Clark, 230 Miss 873, 94 So2d 323 ---------- 9

Will v Calvert Fire Ins. Co., 437 US 655, 57 LEd2d 504, 98 SCt 2552 (1978) ---------- 19

STATUTES AND REGULATIONS

Sec. 11-17-1, Miss Code 1974 ---------- 9

Sec. 11-17-29,Miss Code 1974 ---------------------------- 9
Sec. 15-1-15, Miss Code 1974 ---------------------------- 12
Sec. 15-1-19, Miss Code 1974 ---------------------------- 11
28 USC 1254 (1) -- 2
28 USC 1346(f) --- 2,7
28 USC 1402(d) --- 2,7
28 USC 2409a --- 2,7,13
Public Law 92-562, 92nd Congress, S. 216 ---------- 2,5,7

MISCELLANEOUS

Restatement, Conflict of Laws, Sec. 451(2)
(Supp 1948) --- 18

IN THE

Supreme Court of the United States

ALF KEY, et al,
Petitioners,.

VS. No. ____________

MRS. LOUISE P. WISE, et al,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioners pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on 5 November 1980, and reported at 629 F2d 1049 (App.83).

OPINIONS BELOW

The opinion, cited as *Key v. Wise,* 629 F2d 1049, Fifth Circuit, dated 5 November 1980 (App. 83) is the immediate decision which precipitates this request for review and relief. Pertinent opinions to the issues presented also include the Opinion of the District Court on motions to dismiss the original complaint (App. 39); the unreported findings of the Mississippi Chancellor (trial judge) (App. 48); the Opinion of the Mississippi Supreme Court (App.67), 341 So 2d 1326; the Opinion of the District Court dismissing the original Federal Court complaint (App. 81). unreported; and, of course, the dismissal of the complaint by the District Court. (App.81).

Important to a complete portrayal of the background are orders without opinion of the Fifth Circuit dismissing the appeal from the abstention order (App. 47) and denying the petition of these petitioners for a Writ of Mandamus (App. 64, 65), and the Notice of the United States Supreme Court denying the petition for certiorari to review the denial of the Writ of Mandamus by the Fifth Circuit Court of Appeals (App. 66).

JURISDICTION

The opinion of the Fifth Circuit Court of Appeals sought to be reviewed by this petition bears date of 5 November 1980 (App. 83). The order of the Fifth Circuit overruling the petition for a rehearing as to that opinion is dated 1 May 1981. (App. 125). Jurisdiction of this Court to entertain this petition for a writ of certiorari is believed to be conferred by 28 USC 1254 (l).

FEDERAL STATUTES INVOLVED

Public Law 92-562, 92nd Congress, S. 216, dated 25 October 1972, and incorporated in the United States Code as: 28 USC 1346 (f); 28 USC 1402 (d); and 28 USC 2409a (App. 36).

STATEMENT OF THE CASE

The Keys filed their suit on 21 July 1972, in the United States District Court for the Northern District of Mississippi, Greenville Division, to quiet title to approximately 451 acres of land, lying and being in Humphreys County, Mississippi, to regain possession of said land,

and to be monetarily compensated by defendants who, it was alleged, wrongly obtained possession thereof in 1970. The Keys are black, and they or their antecedents in title lived on the land, beginning in 1886, until the end of the crop season in 1969.

The United States was made a party to the suit because the land records of Humphreys County disclose that in 1961 and 1963 the government purchased from the antecedents of the Wise defendants approximately 100 acres of said lands to be used to build a levee thereon, the land being adjacent to the Yazoo River, a navigable stream.

The Wises, all white and all well-to-do people, are the descendants of Wise Brothers, a partnership, which was engaged in the money lending business, and in fact had loaned money to Key to make crops almost every year from and after 1899, taking as security a deed of trust on the land.

Alf Key, who originally bought the land, lived thereon with his wife, Carrie Cook Key, from 1886 until he died intestate in 1924. He left surviving him his wife; two sons: Roscoe Key and Tom Key; and three daughters: Georgia Key Bolden, Alfred Key Herman and Carrie Key Johnson. The land records show that in 1906, Alf Key deeded to his wife, Carrie, the land he had bought in 1886, approximately 154 acres. In 1912, Alf Key purchased the remaining 297 acres, which he held in his name until his death.

Carrie Cooke Key continued to live on said property until she died intestate in 1956. Roscoe Key lived on said lands, except for 4 or 5 years, until he died thereon in 1950. Tom Key lived all his life on said property, from 1900 until he became fatally strcken with cancer in 1969, and died in 1970. He was the last Key to live on the land, his three sisters having moved away in the 1920's and 1930's.

The land records show that in 1929, Carrie Cook

Key and her son, Tom Key, executed a deed of trust on the 451 acres to Wise Brothers to secure a loan of $5,000.00.

At that time, in accordance with Mississippi law, Carrie Cook Key owned 154 acres, and held an undivided one sixth interest in the remaining 297 acres. Each child, including Tom Key, owned an undivided one sixth interest in the 297 acres left by their father, Alf Key.

In 1930, Carrie Cook Key and her son Tom executed another deed of trust to Wise Brothers on said property to secure a note of $6,224.84 plus $1,000.00 "furnish money." In 1931, Carrie and Tom and Roscoe Key executed yet another deed of trust to Wise Brothers to secure a note of $8,199.51, plus $500.00 "furnish money." None of said deeds of trust were ever marked paid or satisfied on the land records; nor were any of them ever foreclosed.

In 1932, one Louis Fischer, a family member and employee of Wise Brothers, attended the annual Humphreys County tax sale for delinquent land taxes, and bought the 451 acres in question for $143.48, the amount of taxes due for the year 1931. Two years later, on 20 September 1934, the Humphreys County Chancery Court Clerk deeded said property to Louis Fischer. Twenty nine days later, on 19 October 1934, Louis Fischer deeded said property to Wise Brothers for a consideration expressed in the deed of $500.00.

Tom Key, from 1932 through the 1969 crop year, continued to live on said property and to farm same. From 1939 through 1967, Tom Key obtained annual "furnish money" loans from Wise Brothers, for which he pledged by chattel mortgage all his farm tools and equipment and crops.

In 1945, the Mississippi Supreme Court, at the instance of another Humphreys County landowner taxpayer, declared that the Humphreys County tax assessment rolls for 1930, 1931, and 1932, had not been properly equalized, and that therefore all tax sales of property so sold were void.

The next land record transaction affecting the lands in question was a Perpetual Easement Deed to the United States of America from Wise, filed 7 September 1961, for a recorded consideration of $6,500.00. A second Perpetual Easement Deed to the government, also from Wise, was filed 22 November 1963.

In 1969 and 1970, Wise executed various deeds affecting the mineral rights in and to the lands in question. Also, Wise leased the land from November 1969 to the end of the crop year 1972 to James E. Coleman and Jeff Hardwick.

In 1970 and 1972, there were five separate deeds filed for record among various members of the Key family: Alfred Key Herman, sister of Tom Key, deeded her interest in the property to her son, Hosea Herman; Katherine Key Hall, daughter of Tom Key, conveyed her interest to her sister, Louise Key Mason; Augusta Strong Key, widow of Roscoe Key, to her son, Alf Key, Jr.; Nora Key Johnson, daughter of Roscoe Key, to her brother, Alf Key, Jr.; and Liddie Moore Key, widow of Tom Key, to her son, Tom Key, Jr.

When this suit was filed, Wise was in possession of said 451 acres, having peremptorily taken it in 1970, and it could be determined only after the State Court suit was filed that Wise claimed the land by adverse possession.

Neither the United States nor the Wise defendants ever filed an answer to the federal court complaint. At the hearing before the District Judge on Motions of the Wise defendants and the United States to Dismiss (App. 29, 30, 31) the Court considered the recently enacted Public Law 92-562 and decided that the Court had jurisdiction both under the diversity statute and the New Quiet Title Act (App. 39,40), but entered an order abstaining from deciding the issue until the Mississippi State Courts could adjudicate all the title questions. (App. 40,41). Key amended his complaint to rely expressly upon the new Quiet Title Act, moved the Court to reconsider the abstention order, and/or at least to allow Key to rely upon Federal Discovery Acts, because at that time Mississippi had no general discovery law. (App. 43,44). The District Court denied those motions. (App. 46)

Key then appealed to the Fifth Circuit and moved that Court to enjoin the State Court proceedings expressly relying upon the new statute which not only appeared to give U.S. District Court exclusive original jurisdiction to try this case, but also to take away from state court any concurrent jurisdiction. The Fifth Circuit dismissed that appeal (App. 47) one week before the state court trial began.

In January 1973, Wise filed a state court suit seeking to quiet and confirm title in Wise, and to cancel the aforementioned five deeds among Key family members and cancel the Key claim as set up in the federal court suit. Neither the United States, nor the holders of the mineral interests, nor the lessees of the property were made a party. The case was tried in June 1973 in Mississippi Chancery Court, but the decision of the Chancellor was not entered until September 1974, some fifteen months later (App.48-51), and one week after Key had filed a motion for the State Court Chancellor to recuse himself because of an unfair connection with one of the attorneys for Wise (App. 72, 73).

Key appealed the Mississippi trial court holding, which quieted title of the property in Wise, but cancelled only four of the five Key family deeds as clouds on the title. [The state court Chancellor did not cancel the deed from Liddie Moore Key to Tom Key, Jr., and it did not cancel the Key claim as was pleaded in this federal court suit.] (App. 51-54).

Pending the state court appeal, Key petitioned the Fifth Circuit Court of Appeals for a writ of mandamus (App. 55) directing the District Court to try the issues presented by Key. The Fifth Circuit dismissed that petition. (App. 64,65). Key's application to this United States Supreme Court for a Writ of Certiorari was denied on 13 December 1976 (App.66).

The Supreme Court of Mississippi affirmed the Mississippi Trial Court in its opinion dated 23 March 1977 (App.67). Thereafter, Wise moved the District Court below to dismiss the original Key complaint (App. 70). Key countered by filing the state Court record, obtained from the Clerk of the Mississippi Supreme Court, in the federal trial court, along with an affidavit to complain of the prejudice of the State trial judge (App. 72), and by moving the federal court to decide the issues on the state court record (App. 75). The District Judge, without a hearing, overruled Key, sustained the motion of Wise, and dismissed Key's suit (App. 82).

On appeal, the Fifth Circuit affirmed the District Court in a split decision (App. 83), and denied Key's petition for a rehearing or a rehearing en banc (App. 126).

BASIS FOR FEDERAL JURISDICTION IN FEDERAL COURT IN THE FIRST INSTANCE

In the original complaint in federal court below, as amended, Key invokes as a basis of jurisdiction Public Law 92-562, as set forth in 28 USC 1346(f), 28 USC 1402(d), and 28 USC 2409a. (App. 36-38).

REASONS FOR GRANTING THE WRIT

Because the Fifth Circuit decided all issues but two in favor of Key, only those two need be discussed. The first is the jurisdiction and fairness of the State Court; the second is whether the federal court properly determined that the state court's decision that it had jurisdiction was res judicata or conclusive upon the federal courts.

UNFAIRNESS OF AND JURISDICTION OF STATE COURT PROCEEDINGS

The Fifth Circuit opinion delved quite deeply into the State Court record to obtain the facts, set out in the opinion; there was no evidence at all received in federal court (App. 84-90). Upon that record, the Appeals Court decided (1) that the State Court had jurisdiction to try the quiet title issues; and (2) concluded that the lands in question belong to Wise, because the State Court had so held. These conclusions exist in the face of the court's holding, (App. 113,114), that:

"The findings and conclusions of the state trial court in this case would not pass muster in the federal system."

The Mississippi Chancellor found that Wise entered the lands in 1932, and has had possession at all times since, but the Fifth Circuit, in N. 10, pg. 837, recited:

> "From the Chancellor's opinion it is not clear what acts constituted entry on the property under color of title in 1932. The evidence is uncontroverted that none but the Keys lived on the property until 1970....What is not clear from the opinion or the record is how the Wises acquired color of title in 1932....Neither the Mississippi Supreme Court's opinion nor (than) that of the Chancellor make or refer to any findings of specific historical facts. Moreover, although the Mississippi Supreme Court cites two cases, the Chancellor cites none; and the two citations in the Mississippi Supreme Court's opinion are of little help in determining what law was applied in concluding that the Wises

> had obtained title by adverse possession under color of title. To borrow a phrase from one of Britain's famous statesmen, the decision in this case remains very much 'an enigma cloaked in mystery.' "

The record clearly shows that the only thing which tended to affect title to the land in question in 1932 was the purchase of the land for taxes by Louis Fischer for $143.48. Two years thereafter in 1934, a tax title was conveyed by the Chancery Clerk to Louis Fischer. And twenty nine days later Fischer conveyed the property to Wise Brothers. But the record fails to show that either Louis Fischer or Wise Brothers partnership ever took possession of the land until 1970. It has heretofore been mentioned that the tax sale by which Fischer acquired the property was declared void by the Mississippi Supreme Court in 1945.

It must be strongly emphasized that the Mississippi State Courts, under Mississippi law, had no jurisdiction to entertain a quiet title action to the lands in question unless the United States, and all other claimants to the land, be made parties. By virtue of Sections 11-17-1 and 11-17-29, Miss. Code 1974, suits to confirm or quiet tax title, or any other title, to land must bring in as parties all persons interested in the land, and the original bill must also include the oath of the pleader that all parties interested have been included so far as is known or could be ascertained by diligent inquiry. *Smith v. Denny,* 90 Miss. 434, 43 So. 479; *Leech v. Masonite Corporation,* 219 Miss. 176, 68 So 2d 297. The jurisdiction of the Court does not attach unless and until the title is deraigned by complainants to all necessary parties. *Warren v. Clark,* 230 Miss. 873, 94 So2d 323. And if it appears from the pleadings that necessary parties have been omitted, the proceedings are void, and a void decree thus entered may be attacked either directly or collaterally. *Paepske-Leicht Lumber Co. v. Savage,* 137

Miss 11, 101 So. 709. The cited cases hold the decree is void as to all parties, not just those who were not joined.

The Wise state court complaint had attached to it, as Exhibit "E," the Key federal court complaint, and as Exhibit "G" the order of abstention by the federal District Court below. The Wise pleadings expressly alleged that the United States claims a substantial part of the 451 acres. Yet it was not made a party.

There is no doubt that the United States is a necessary party to this action. This Court has held that all parties entitled to litigate the same questions are necessary parties to a suit in equity. *Nashville & D.R. Co. v. Orr,* 18 Wall 471, 21 LEd 810. And in a suit between the states of Arizona and California to adjudicate their respective rights to the waters of the Colorado River, it was held that the Government was a necessary party thereto by reason of its permanent power to control the waters of a navigable river. *Arizona v. California*, 298 US 558, 80 LEd 1331, 56 SCt 848.

The final decree, rendered by the state court in September 1974 confirmed and quieted title to the whole 451 acres in Wise, *including the land covered by the perpetual easement deeds from Wise to the government in 1961 and 1963*. The proof in the case, by Wises' witnesses, shows the two perpetual easement deeds, the aforementioned mineral rights deeds, and the fact that the property was under lease to two non-parties at the time this suit was filed in federal court. There was no reservation in the state court final decree recognizing those deeds; the rights granted thereby were all effect ually extinguished.

Aside from the fact that the tax sale was declared void judicially, there exists another legal impediment to the acquisition of the land, under a tax deed, by Wise. In Mississippi the rule is that while the relation of mortgagor and mortgagee, or his assignee, exists, such mortgagee or his assigns cannot, by purchase at a tax sale, acquire a tax title to the property covered by the mortgage which will cut off or defeat the title, rights or equity of redemption of the mortgagor. *Perkins v. White,* 208 Miss 157, 43 So2d 897; *McGee v. Holmes,* 63 Miss 50. A purchaser at a tax sale is not an innocent purchaser for value, but takes title subject to all its infirmities. *James v. Tax Inv. Co.,* 206 Miss 605, 40 So2d 539; *Roebuck v. Bailey,* 176 Miss 234, 166 So 358. Neither one under a duty to redeem, nor those claiming through him can purchase a tax title from the state and invoke the statute. *Lyebrook v. Hall,* 73 Miss 509, 19 So 348.

Wise argued, and plead in the state court suit, that Wise entered upon and took possession of the land because there was money due under one or more of the three mortgagees. The proof renders this argument unavailing. There was no proof *that* Wise took actual possession of the land; there was no proof *when* Wise took possession; and most importantly, there was no proof that any of the Key mortgagees actually *owed* Wise any money under the mortgages when, or if, Wise did take possession. The statute, Section 15-1-19, Mississippi Code 1974, a limitation of action law, provides:

> "When a mortgagee, after condition broken, shall obtain the actual possession or receipt of the profits or rent or rent of land embraced in his mortgage, the mortggor, or any person claiming through him, may not bring a suit to redeem the mortgage but within ten years next after the time at which the mortgagee obtained such possession or receipt...."

The proof does not support a supposition that Wise claimed the land because of any money due under Mortgage. Under Mississippi law both the debt and the mortgage were barred by statute in 1937. And no testimony supports the claim that Wise obtained possession prior to that date.

Wise takes the position that even though the tax title was void (they ignored the jurisdictional impediment), they were protected by Section 15-1-15 Mississippi Code 1974, which provides:

> "Actual occupation for three years, after two years from the date of sale of land held under a conveyance by a tax collector in pursuance of a sale for taxes shall bar any suit to recover such land or assail such title because of any defect in the sale of the land for taxes...."

As was noted in the Fifth Circuit opinion, Wise claims that the possession of Tom Key, one of the co-tenants who owned a one fifth interest in the lands after his mother died in 1956, enured to the benefit of Wise. Thus, the Wise possession relied upon was constructive, not actual.

The Supreme Court of Mississippi has held that the type of occupation required in order to begin the running of the statute had to be actual, and not a mere constructive possession. *Cox v Richardson*, 186 Miss 576, 191 So 99, 124 ALR 1138. And, in two cases precisely in point, the highest Court of Mississippi has held that the continued possession by a former tenant, after a tax sale, is constructive, not actual, and does not initiate the running of the statute. *Smith v Anderson*, 193 Miss 161, 8 So 2d 251; *Heidelberg v Duckworth*, 206 Miss 388, 40 So 2d 179. Until his possession is invaded or disturbed by the purchaser at the tax sale, or by a subsequent vendee of such purchaser, the statute of limitation prescribed by the statute for commencing an action does not begin to run. *E.L. Bruce Co. v Smallwood*, 188 Miss 771, 196 So 227. See also, *Grant v Montgomery*, 193 Miss 175, 5 So 2d 491; *Leavenworth v Claughton*, (Miss.) 19 So 2d 815; *State v Butler*, 197 Miss 218, 21 So 2d 650; *Russell Investment Co. v Russell*, 182 Miss 385, 178 So 815, 182 So 102; *Byrd v Byrd*, 193 Miss 249, 7 So 2d 510; *Hooper v Walker*, 201 Miss 158, 29 So 2d 72; *Hamner v Yazoo-Delta Lumber Co.*, 100 Miss 349, 56 So 466; *Smith v Myrick*, 201 Miss 647, 29 2o 2d 924. The adverse possession statute in Mississippi simply does not begin to run until an owner, or co-owner, has had his possession taken from him. *Ellard v Logan* (Miss), 39 So 2d 485; *Newman v J.J. White Lbr. Co.*, 162 Miss 581, 139 So 836; *Trigg v Trigg*, 233 Miss 84, 101 So 2d 507; *Neal v Teat*, 240 Miss 35, 126 So 2d 124; *Bigland v Rawles*, 247 Miss 226, 153 So 2d 665.

The Mississippi courts, by its own laws, had no jurisdiction to quiet title to the property in question, without the United States as a party. Furthermore, Wise did not prove adverse possession under any theory available.

As long as Tom Key, one of the owners of the property, held the actual possession thereof, he had everything the law can give him, and it was unnecessary for him to resort to a suit to regain that which he never lost. *Neal v Teat*, 240 Miss 35, 126 So 2d 124; *Bigland v Rawles*, 247 Miss 226, 153 So 2d 665; *Trigg v Trigg*, 233 Miss 84, 101 So 2d 507.

Wise argued attornment, which is a part of a landlord-tenant relationship. But until the proof shows that Key was a tenant of Wise as to the lands in question, the Court cannot get to attornment. Until the statute of limitations has been properly ignited, and thereafter runs the statutory period, Wise cannot own the land, and Key cannot become the tenant. Furthermore, all properly admissible evidence introduced to support attornment occurred less than twelve years before this suit was filed, that is, after 21 July 1960. 28 USC 2409a(f). (App. 37).

There is no proof, or applicable law, in existence which supports the Wise claim to the lands in question. The Chancellor rendered an enormously prejudicial decision against Key. Nor did the Supreme Court of Mississippi rule upon the principal issues.

Key relies upon the rationale pronounced in *England v Louisiana Medical Examiners,* 375 US 411, 11 L Ed 2d 440, 84 S Ct 461, (1964) as a substantial reason why a litigant should not, by abstention of the trial court, be denied a federal court trial, to which the litigant is entitled in the federal court. It was there reasoned:

> "Limiting the litigant to review here would deny him the benefit of a federal trial court's role in constructing a record and making fact findings. How the facts are found will often dictate the decision of federal claims...Thus in cases where, but for the application of the abstention doctrine, the primary fact determination would have been by the District Court, a litigant may not be unwillingly deprived of that determination."

And in *Montana v United States,* 440 US 147, 59 LEd 2d 210, 99 SCt 970 (1979), this Court again recognized that unfairness or inadequacy in the state procedures may well be a basis for denial of a preclusive effect of such state court decisions upon a subsequent federal court trial of the same issues. In note 11 of *Montana,* the Court held that:

> "Redetermination of issues is warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation. See Restatement (Second) of Judgements, Sec. 68.1 (c) (Tent Draft No. 4, Apr. 15, 1977); Note, The Preclusive Effect of State Judgements on Subsequent 1983 Actions, 78 Column L Rev 610, 640-653 (1973); Cf. *Gibson v Berryhill,* 411 US 564, 36 LEd 2d 488, 93 SCt 1689 (1973); *Trainor v Hernandez,* 431 US 434, 469-470, and n.15, 52 LEd

2d 486, 97 SCt 1911 (1977) (Stevens, J., dissenting)."

The motion of plaintiffs, in the District Court, to decide the issues on the record adduced in state court, (App. 75), points out the many deficiencies in the record, without which the state judgement is meaningless.

Key ought to be allowed, at least, to try in federal court those necessary issues not decided in the state court record.

RES JUDICATA

Under the facts of this case, the Fifth Circuit found "...the federal court was the first court to assume jurisdiction of the res in dispute, thereby activating the bar of exclusive in rem jurisdiction." (App. 100). And, reasoned that Court, "When Congress had directed, however, not only that the federal courts may take jurisdiction of a particular class of cases, but also that they have exclusive jurisdiction of those cases, abstention to permit adjudication of the entire case in a state forum defeats the purpose of that legislation." (App. 100-101).

"Abstention in this case was clearly improper, even leaving to one side the exclusive character of the federal court's jurisdiction." (App. 101).

The Fifth Circuit held that the Mississippi Court's decision that it had jurisdiction to adjudicate this quiet title action is res judicata and must be followed by the federal courts. That holding is grounded upon three premises: (1) that the state court had concurrent jurisdiction with the U.S. District Court to try cases under 28 USD 2409a and 1346(f); (2) that the state court interpreted those federal statutes, found it had jurisdiction, and therefore such a jurisdictional determination by the state court is conclusive upon federal courts; and (3) that the state court was the first court to hold that it had jurisdiction to try this action.

Does a state court continue to have jurisdiction over a particular suit, after Congress has decreed that the U.S. District Court shall have exclusive original jurisdiction? Key submits that this Court has answered that question negatively. *Moore v. Dempsey,* 261 US 86, 67 LEd 543, 43 SCt 265. Cf. *Johnson v. Zerbst,* 304 US 458, 82 LEd 1461, 58 SCt 1019.

California v. Arizona, 440 US 59, 59 LEd2d 144, 99 SCt 919 (1979) holds, as to the statutes in question and on the point under consideration:

> "The congressional purpose was simply to confine jurisdiction to the federal courts and to *exclude* the courts of the States, which otherwise might be presumed to have jurisdiction over quiet title suits against the United States, once its sovereign immunity had been waived." (emphasis added.)

and again, the Court said:

> "We find, therefore, that Sec. 1346(f), by vesting exclusive original jurisdiction of quiet title actions against the United Stated in the federal district courts did no more than assure *that such jurisdiction was not conferred upon the courts of any State.*" (emphasis added.)

It appears that the clear teaching of this Court, in California, is that Public Law 92-562 has pre-empted, in favor of the U.S. District Courts, the power of a State Court to decide the issues presented by the case at bar.

Since *Kalb v. Feuerstein,* 308 US 433, 84 LEd 370, 60 SCt 343 (1940), the rule has been that a grant of exclusive jurisdiction of a cause to federal court, excludes state court jurisdiction thereto. In so ruling, the Court said that:

> "the determination whether the Act did so operate is a construction of that Act and a Federal question..."

The Court held that the grant of exclusive jurisdiction to a federal court by the Frazier-Lemke Act:

> "...conclusively demonstrate that Congress intended to, and did deprive the Wisconsin County Court of the power, and jurisdiction to continue or maintain in any manner the foreclosure proceedings against appellants..."

Thus, the action of the state court, so pre-empted:

> "...was not merely erroneous but was beyond its power, void and subject to collateral attack."

Durfee v. Duke, 375 US 106, II LEd2d 186, 84 SCt 242 (1963), did not involve an exclusive federal jurisdiction question, but even so introduced two rules which are important here. The first is:

> "To be sure, the general rule of finality of jurisdictional determination is not without exceptions. Doctrines of federal pre-emption of sovereign immunity may in some contexts be controlling....
>
> and
>
> "...a judgment is entitled to full faith and credit—when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment."

It is most apparent that the federal statute has preempted state court jurisdiction. And, if Restatement, Conflict of Laws, Sec. 451(2) (Supp. 1948) be relied upon as a guide, (App. 91, 92), it must be determined that in this case (a) the lack of jurisdiction over the subject matter, by the state court, is clear; (b) the determination as to jurisdiction depended upon a question of law rather than of fact; and (c) the policy against the state court acting beyond its jurisdiction, is weak, under the peculiar facts of this case.

The second rule of *Durfee*, also cited by the Fifth Circuit, is that actual litigation of the jurisdictional issues by the first court to litigate them, is the determining factor. But in this case, suit was initiated in federal district court. The jurisdictional questions under consideration were twice decided by the U.S. District

Court, before the state court suit was filed. The Fifth Circuit Court of Appeals dismissed Key's appeal invoking the same jurisdictional questions, prior to the state court trial. Pending the appeal from the state trial court to the Mississippi Supreme Court, The Fifth Circuit Court of Appeals dismissed Key's petition for a mandamus to require the U.S. District Court to try this case, and the U.S.Supreme Court declined to grant certiorari. The Jurisdictional questions were first decided in this case by the federal court, not state court. The Mississippi Courts simply followed the construction of a federal statute, as had been applied by a federal court. The first forum to decide the very jurisdiction questions now presented, was the U.S. District Court below, not a state court. Thus, the doctrine of res judicata, as defined in *Durfee*, is not applicable.

The Fifth Circuit held that the District Court below never should have abstained to allow the state court to decided the issues. (App. 101). In accordance with *McClelland v. Carland*, 217 US 268, 54 LEd 762, 30 SCt 501 (1910), the writ of mandamus requested by Key should have been granted. *Thermtron Products Inc. v. Hermansdorfor*, 423 US 336, 46 LEd2d 542, 96 SCt 584 (1976) supports the very same conclusion. *Will v. Calvert Fire Ins. Co.*, 437 US 655, 57 LEd2d 504, 98 SCt 2552 (1978), another mandamus suit, entertained a slightly different factual situation. There, to a previously filed state court suit, Calvert answered and counterclaimed. *Calvert* also filed a suit in federal court against the state court plaintiff, relying upon all pleadings set up in the state court counterclaim, plus a separate count for damages under about the same facts, per Sec. 10(b) of the Securities & Exchange Act of 1934 (which Act granted the United States District Courts exclusive jurisdiction to enforce same). *Will* held that the District Court did not abuse its discretion to delay trying that portion of the suit over which the federal court had exclusive jurisdiction, until after the state court tried that portion of the suit over which it had concurrent jurisdiction. *Will* also held that:

> "Where a district court obstinately refuses to adjudicate a matter properly before it, a court of appeals may issue the writ to correct unauthorized action of the district court obstructing the appeal."

Though the Court held the District Court had the discretion to delay setting the federal court suit until after the state court decided the issues, Mr. Justice Brennan for the dissent wrote:

> "For myself, I confess to serious doubt that it is ever appropriate to accord res judicata effect to a state court determination of a claim over which the federal courts have exclusive jurisdiction; for surely state court determinations should not disable federal courts from ruling de novo on purely legal questions surrounding such federal claims. See *Cotler v. Inter-County Orthopaedic Assn.* 527 F2d 537 (CA3 1975); *McGough v. First Arlington National Bank,* 519 F2d 552 (CA7 1975); *Clark v. Watchie*, 513 F2d 994 (CA9 1975). As recognized by Judge Learned Hand in *Lyons v. Westinghouse Electric Co.,* 222 F2d 184, 189 (CA 2 1955), 'the grant to the district courts of exclusive jurisdiction over the action...should be taken to imply an immunity of their decisions from any prejudgment elsewhere.' "

England v. Louisiana Medical Examiners, 375 US 411, 11 LEd2d 440, 84 SCt 461 (1964) gives rise to the conclusion that if abstention by the federal court was wrong in the first place, a determination of the controversy by state court is not conclusive upon adjudication of the same suit in federal court. *England*, of course, was a suit the jurisdiction of which to try it existed in both state and federal court. The very same reasons supported the conclusion that the District Court abstention was wrong, as supported the inapplicability of the doctrine of res judicata. *England* specifically excluded the application of the doctrine of res judicata to state court decisions:

> "...unless it clearly appears that he voluntarily did more than Windsor required and fully litigated his federal claims in the state court."

The Fifth Circuit observed in its opinion that Key did not litigate his claim in state court; contrarily, Key took the position throughout this litigation, both state and federal, that this quiet title action ought be decided only in federal court. (App. 97,98).

Colorado River Water Cons. Dist. v. U.S., 424 US 800, 47 LEd2d 483, 96 SCt 1236 (1976) comes as close to supporting the views of the Fifth Circuit as does any recent decision by this Court. There are differences, which are material. The federal court did not have exclusive original jurisdiction; in fact jurisdiction was concurrent in both state and federal court. And, the District Court did not abstain and keep jurisdiction; it dismissed the federal suit. The dissent of Mr. Justice Stewart applies reasoning which is peculiarly applicable to the case where federal court jurisdiction, first invoked, is exclusive and original:

> "The Court says that the United States District Court for the District of Colorado clearly had jurisdiction over this lawsuit. I agree. The Court further says that the McCarran Amendment 'in no way diminshed' the District Court's jurisdiction. I agree. The Court also says that federal courts have a 'virtually unflagging obligation...to exercise the jurisdiction given them.' I agree. And finally, the Court says that nothing in the abstention doctrine 'in any of its forms' justified the District Court's dismissal of the Government's complaint. I agree.

> *These views would seem to lead ineluctably to the conclusion that the District Court was wrong in dismissing the complaint."* (emphasis added).

In the case at bar, state court jurisdiction does not seem to be concurrent, as is assumed by the Fifth circuit.

Brown v. Felsen, 442 US 127, 60 LEd2d 767, 99 SCt 2205 (1979) refused to apply res judicata in a bankruptcy court, where jurisdiction, was exclusive, from a state court judgment regarding the same debt. In arriving at such a conclusion, the Court observed:

> "For the sake of repose, res judicata shields the fraud and the cheat as well as the honest person. It therefore is to be invoked only after careful inquiry."

and

> "Refusing to apply res judicata here would permit the bankruptcy court to make an accurate determination whether respondent in fact committed the deceit, fraud, and malicious conversion which petitioner alleges."

The case at bar involves the question whether Wise properly went upon Key lands in 1970, took possession thereof, and properly excluded all the Keys therefrom. Wise claims by adverse possession, which had not been adjudicated prior to the time the last Key in possession died. If Wise went upon the land without a claim of right, as Key asserts is the case, then Wise is just as wrong as if he had stolen the land. It is a fact, well known to any good Mississippi title lawyer, that the land records of Humphreys County, Mississippi, at the time the government bought the perpetual easement deeds from Wise, clearly showed the title to be in Key, not Wise. That, of course, occurred within 12 years of the filing of this suit.

The state court, below, did not have concurrent jurisdiction to try this case; the question of state court jurisdiction to try quiet title suits as to real property to which the United States claims an interest, is a federal question; and the decision by the Mississippi Court that it did have jurisdiction over the res was not conclusive upon the Federal Court below for the further reason that the Federal Court first made that jurisdictional determination. It is that Federal Court determination which Key here appeals from.

CONCLUSION

Key prays this Court to grant certiorari, and, upon a consideration of the pertinent principles of law, to reverse the Court of Appeals and the District Court, and remand the case for trial of the issues by the District Court.

Respectfully submitted,
C. M. Murphy
C. M. Murphy
Attorney for Key Petitioners
524 Melody Lane
Memphis, Tennessee 38119

Appendix

COMPLAINT

U.S. District Court
Northern District of Mississippi
No. GC 7281-K

Filed 7-21-72

1. Plaintiffs, Alf Key, Roscoe Key, Jr., Peter Andrew Key, Joe Alfonzia Key, Paul Key, Tom Key, Jr., and Louise Key Mason are non-residents of Mississippi and are residents and citizens of the State of Illinois. Plaintiffs, Georgia Key Bolden and Waldo H. Herman are non-residents of Mississippi and are residents and citizens of the State of Michigan. Plaintiff, Nora Key Johnson, is a non-resident of Mississippi and is a resident and citizen of the State of Ohio. Plaintiff, Gilbert Johnson, is a non-resident of Mississippi and is a resident and a citizen of the State of Texas.

2. Defendants, Mrs. Louise P. Wise, Dr. Louis J. Wise, Jr., Louis Wise, Mrs. Amy Wise Permenter, Louis Paul Fischer and Eugenia Fischer, are residents and citizens of the State of Mississippi. The Defendant, Fannie Wise Kortjohn, is a resident and a citizen of the State of New York, and a non-resident of Mississippi. The Defendant, First National Bank of Huntsville, Alabama, is a corporation, and is a resident and citizen of the State of Alabama, and a non-resident of Mississippi. The Defendants, Max J. Heinberg, III, Mrs. Pauline Heinberg Gagliano, Charles E. Heinberg, William W. Heinberg, and Mrs. Eugenia F. Heinberg, are all residents and citizens of the State of Louisiana, and are non-residents of Mississippi. The United States of America is a necessary party to this suit, and the matter in controversy exceeds, exclusive of interest and cost, the sum of $10,000.00.

3. This is an action for a declaratory judgment pursuant to Section 28, USC 2201, for the purpose of determining a question of actual controversy between the parties, as hereinafter more fully appears. The action also seeks an injunction and an accounting.

4. This suit asks the Court to declare the rights of the parties in and to certain real property lying and being in the County of Humphreys, State of Mississippi, and being more particularly described as follows:

> Lots 1, 2 and 7 of Section 31, Township 15 North, Range 2 West, and Lot 5, Section 32, Township 15 North, Range 2 West, containing 4.51 acres, more or less.

5. The Plaintiffs claim the land in question as heirs and descendants of Alf Key and his wife, Carrie Cook Key, who acquired the ownership, possession and title to said lands around 1900.

6. The said Alf Key, who died in 1924, or his widow, Carrie Cook Key, who died in 1956, or one of their children, Tom Key, remained continuously in possession of said real property until the end of the crop season in 1969, at which time, the Defendants, or their predecessors in title, took possession when the said Tom Key became too ill to care for the place. Tom Key died in May, 1970.

7. The predecessor in title of all the Defendants, was a partnership composed of Louis Wise and Herman Wise, brothers, who did business as Wise Brothers in Yazoo City, Yazoo County, Mississippi. The said partnership, beginning before 1920, and continuing through the year 1969, lent money almost every year to the said

Alf and Carrie Key, then to their son, Tom Key, for the purpose of making their crops, and would take as security therefor a mortgage or deed of trust on the land in question, plus crops and other personal property. Thus in the year 1931, and the several years before and after, the Wise Brothers partnership had a security interest in said lands as mortgagee.

8. The taxes on said lands were not paid for the year 1931, and thereafter, one Louis Fischer, an agent of and employee of Wise Brothers (who was a nephew of the original partner, and a son of one of the partners at that time) bought the property at the Sheriff's delinquent tax sale. On September 20, 1934, he was deeded said property for the sum of $143.48, by deed recorded in Deed Book 11 at Page 460 in the Records of the Chancery Clerk of Humphreys County, Mississippi. On the 19th day of October, 1934, the said Louis Fischer deeded said lands to his employers, the Wise Brothers, said deed being recorded in Deed Book 11 at Page 489 of the Records of the Chancery Court of Humphreys County, Mississippi, and both are adopted by record herein, as if copied verbatim. Plaintiffs allege and charge that the said Louis Fischer bought the lands at said tax sale as agent of, and for and on behalf of, his employers and family, the Wise Brothers. This is the sole and only source of any claim to the title or ownership in and to said lands by Defendants.

9. Plaintiffs charge that the Wise Brothers did in fact collect from Carrie Cook Key or her children, all monies and considerations paid for said land at the tax sale in question, but they never in fact deeded said property back, as they were under a duty to have done.

10. The aforementioned tax sale was void for several

reasons. In the first place, the equalization of taxes for tax year in question by the Humphreys County Board of Supervisors was not accomplished at the July meeting, as required by statute, which thereupon rendered the tax sale void, and the aforementioned deeds of no force and effect. The practice then effected by the Humphreys County Board of Supervisors was condemned in the case of *Gardner vs Price*, 197 Miss. 831, 21 So. 2d 1 (1945). Furthermore, notice of said tax sale was never given or served upon any of the true owners of the property, and the notice published in the local newspaper, as required by law, gave notice only to "Alf Key Estate." After Alf Key died, no estate was ever opened for him, and there never was a legal entity known as the Alf Key Estate.

11. The Wise Brothers partnership never claimed the land in question as its own; never took possession of said land; until the said Tom Key moved off the place late in 1969, as aforesaid. From the time of said tax sale until late 1969, Wise Brothers dealt with Carrie Cook Key and her sons as they did before the tax sale; that is, they lent them money to farm, collected and sold all the crops, then paid over the balance, if any, to them. The Keys lived on, possessed and occupied the premises at all times from before 1920 until late 1969.

12. Presently, the Defendant, Wise Brothers, now claims the land in question, since Tom Key moved off because of a terminal illness which resulted in his death. They have leased the land to others and are collecting rent therefrom, all of which belongs to Plaintiffs.

13. Unknown to Plaintiffs, the Defendants, or their predecessors in title, entered into a Perpetual Easement Agreement with the United States of America, granting to the United States of America an easement to a part

of the property in question, for a consideration of $6,500.00, which agreement is filed for record in Deed Book 59 at Page 245 of the Land Records in the Chancery Clerk's Office of Humphreys County, Mississippi. Thereafter, the Defendants granted another easement to the United States of America to more of the lands in question, for $300.00, which second easement is filed for record in Deed Book 64 at Page 126 of the Land Records of the Chancery Clerk's Office of said County and State. Both said easements are adopted by reference herein, as if copied verbatim. The Plaintiffs or their predecessors knew nothing about either easement, received no consideration therefor, and were not approached by any representative of the United States Government to sell their interest in and to said lands. Plaintiffs charge that the United States of America knew or should have known that the title in the Wise Brothers was void; and that therefore, it dealt with them at its own risk. The Defendant, United States of America, did not condemn said lands to procure said easement; the said easement instruments indicate they were procured in connection with work on the Yazoo River levee.

14. Beginning in November, 1969, a series of instruments were filed for record, in the Humphreys County Chancery Clerk's office, apparently for the purpose of settling the interests of the remaining partners of Wise Brothers, which Plaintiffs are informed and believed has now ceased doing business. Those instruments are recorded in said records in Deed Book 78 at Page 29; Deed Book 78 at Page 181; Deed Book 78 at Page 207; Deed Book 78 at Page 224; Deed Book 78 at Page 278; Deed Book 78 at Page 389; Deed Book 79 at Page 71; Deed Book 79 at Page 387; Deed Book 83 at Page 118; and Deed Book 84 at Page 512.

15. Plaintiffs maintain that the said tax sale purchase for 1931 taxes due on the land in question was void; that the deed from Fischer to Wise Brothers was also void; but that even if said tax sale was good, the said Wise Brothers held the land in question in trust for the Plaintiffs, and that said land must now be conveyed back to the Plaintiffs, who here and now demand it back. Or, if the deeds were anything, they amounted only as a mortgage or deed of trust on said property to accure the payment of the 1931 taxes. Plaintiffs allege and charge that said 1931 taxes have long since been collected by said Wise Brothers partnership. Both deeds above referred to, the tax deed from the Humphreys County Chancery Clerk to Louis Fischer and the deed from Louis Fischer to Wise Brothers, constitute clouds upon the title of these Plaintiffs as heirs at law of Alf Key and Carrie Cook Key, deceased, and should be cancelled of record.

16. Wherefore, premises considered, Plaintiffs pray:

1. That the above described tax deed to Louis Fischer, and his subsequent deed to Wise Brothers, be declared void and of no force and effect.

2. That the deeds listed in §14 hereinabove be declared void and of no force and effect, and removed as clouds on the title to the lands in question.

3. That either the two easements mentioned in §13 above, by which the United States of America claims an interest in the lands in question be declared void and of no effect, or that the said United States of America be ordered to pay Plaintiffs the sum of $6,800.00, plus interest, or a reasonable sum of money representing the value of the lands described in said easements.

4. That said deeds be removed as clouds on the title of Plaintiffs in and to the above described property.

5. That the Defendants, or their agents, be required to execute a deed of said property to the Plaintiffs.

6. That Plaintiffs have judgment against the Defendants for immediate possession of the above described real property, and damages for the wrongful withholding thereof.

7. That Plaintiffs have judgment against the Defendants for all rents and profits and income from said property since they took possession thereof the latter part of the year 1969.

8. That Plaintiffs have such further relief as the Court may deem just, including costs.

MOTION TO DISMISS

U.S. District Court
Northern District of Mississippi
No. GC 7281-K

Filed 8-21-72

The defendants, Louis Wise, Dr. Louis J. Wise, Jr., Mrs. Louise P. Wise, Louis Paul Fischer, and Eugenia Fischer, being all of the parties defendant presently served with process, other than the United States of America, respectfully move the court:

To dismiss the action on the ground that the court lacks jurisdiction for the following reasons:

(a) The complaint, in so far as it seeks a declaratory judgment against the United States in regard to the title to real property and auxiliary relief, is insufficient where there is no allegation of consent by the United States to be sued, and there is no allegation of either an unconstitutional grant of authority or that federal agents exceeded the scope of their authority.

(b) All parties in interest to the "Alf Key" claim are necessary and indispensable parties to the determination of title question and the auxiliary accounting sought in this suit. *Certain of these parties are citizens of the State of Mississippi,* thus totally destroying diversity under Rule 19 as the rule existed prior to July 1, 1966, and requiring dismissal under the tests of feasibility and of equity and good conscience governing subsequent to July 1, 1966..

MOTION TO DISMISS

U.S. District Court
Northern District of Mississippi
No. GC 7281-K

Filed 9-22-72

Comes now the United States of America, defendant in the above-captioned and numbered cause, by and through H. N. Ray, United States Attorney for the Northern District of Mississippi, and moves the Court to dismiss this action for the following reasons:

(1)

The Court lacks jurisdiction under Section 2410, Title 28, United States Code. Section 2410 provides that the United States may be named a party to an action in a federal district court or state court having jurisdiction over the subject matter when the United States has or claims a *mortgage or other lien interest.* This Section does not include situation where the United States has an easement interest as distinguished from a lien interest. Plaintiff is asking the Court to extend the meaning of Title 28, U.S.C.A., Section 2410 to include situations where the United States claims a title interest as well as a lien interest.

(2)

The Court lacks jurisdiction under Section 1346(a), Title 18, United States Code. The defendants, or their predecessors in title, entered into Perpetual Easement Agreements with the United States in *1961* and *1963*, and said Perpetual Easement Agreements were recorded in Deed Book 59 at page 245 on September 7, 1961, and in Deed Book 64 at page 126 on November 22, 1963, in the Land Records of the Chancery Clerk's Office of Humphreys County, Mississippi. Said lease agreements are attached hereto as Exhibits "A" and "B" respectively. Plaintiffs had constructive knowledge of these easements on September 7, 1961 and November 22, 1963, the date of recording said easements in the Chancery Clerk's Office of Humphreys County, Mississippi. A six year limitation period applies to claims under the Tucker Act, Section 1346(a), Title 28, U.S.C., in accordance with Section 2401(a), Title 28, U.S.C. Since plaintiff's action against the United States accrued on September 7, 1961 and November 22, 1963, respectively under the Tucker Act, this action is barred by statute of limitations. The running of statute of limitations is not merely a defense of action brought against the United States under the statute governing jurisdiction of civil actions on claims, but deprives the court of subject matter jurisdiction over the action.

Respectfully submitted
H. M. RAY
United States Attorney

SUPPLEMENTAL MOTION TO DISMISS

U. S. District Court
Northern District of Mississippi
No. GC 7281-K
Filed 10-12-72

The defendants, Louis Wise, Dr. Louis J. Wise, Jr., Mrs. Louise P. Wise, Louis Paul Fischer, and Eugenia Fischer, being all of the parties defendant presently served with process, other than the United States of America, respectfully move the court:

To dismiss the action on the ground that the court lacks jurisdiction for the following reasons:

(a) The complainant, in so far as it seeks a declaratory judgment against the United States in regard to the title to real property and auxiliary relief, is insufficient where there is no allegation of consent by the United States to be sued, and there is no allegation of either an unconstitutional grant of authority or that federal agents exceeded the scope of their authority.

(b) The complaint, in so far as it seeks to recover from the United States the value of certain lands described in easements recorded Deed Book 59 at Page 245 and Deed Book 64 at Page 126 of the records of Humphreys County, Mississippi, is insufficient for lack of jurisdiction in that the six year statute of limitations set out Section 2401 (a) Title 28, U.S.C., applies. The easements were filed for record September 7, 1961, and November 22, 1963, respectively, and the United States entered into the actual physical possession of each such easement, as to the first not later than November 9, 1961, and as to the second not later than September 10, 1963, and remained in such actual physical possession continuously thereafter. (See authenticated copy of each easement and affidavit of Lucille Latta).

(c) All parties in interest to the "Alf Key" claim are necessary and indispensable parties to the determination of the title question and the auxiliary account sought in this suit. Alf Key died many years ago and prior to December 1, 1941. He was survived by his wife Carrie Cook Key and five children born to the marriage of Alf Key and Carrie Cook Key who were: Roscoe Key, Tom Key, Georgia Key Bolden, Alfreda Key Hermon, and Carrie Key Johnson. Carrie Cook Key died intestate subsequent to December 1, 1941. Of the said five children born to Alf Key and Carrie Cook Key, two yet survive. They are: Georgia Key Bolden, a party plaintiff and Alfreda Key Hermon who does not appear as a plaintiff, is an indispensable party, and was, at the time of the filing of the complaint, an actual bona fide resident and citizen of Humphreys County, Mississippi. Of the three remaining children: (1) Roscoe Key died survived by his wife and seven children. Six of his children are joined as plaintiffs (Alf Key, Roscoe Key, Jr., Peter Andrew Key, Joe Alfonzia Key, Paul Key and Nora Key Johnson); and one of his children, Lynell Key Jackson, and his widow, Augusta Key, do not appear as parties, are indispensable parties; and were, at the time of the filing of the complaint, actual bona fide residents and citizens of Rankin County, Mississippi; (2) Tom Key died intestate. His estate is being administered in Cause No. E-2828 of the Chancery Court of Humphreys County, Mississippi. He was survived by his wife and three children. Two of the children are joined as plaintiffs, (Tom Key, Jr. and Louise Key Mason); and his widow, Liddie Key and her daughter Katherine Key Hall, do not appear as plaintiffs; are indispensable parties; and were, at the time of the filing of the complaint, actual bona fide residents and citizens of Humphreys County, Mississippi; (3) Carrie Key Johnson died intestate survived by her husband, Gilbert Johnson, as her sole heir at law, who is a party of the complainant. (See affidavits of Jeff H. Hardwick and Lucille Latta; authenticated copy of easement executed by Augusta Key and others who are the heirs of Roscoe Key, deceased; and authenticated copy of Petition and Decree in said Cause No. E-2828).

(d) Since the citizens of Mississippi, listed above in sub-paragraph (c), who are: Alfreda Key Harman, Lynell Key Jackson, Augusta Key, Liddie Key, and Katherine Key Hall, are indispensable parties who must be joined and are citizens of Mississippi, diversity is destroyed and the court deprived of jurisdiction. The movants are without knowledge why these indispensable parties are not joined. No conveyances appear of record from any such party to any party appearing as a plaintiff. But movants charge that any such conveyances, if any exist, do not aid plaintiffs to maintain diversity but disclose such a tactic as brings into play 28 U.S.C.A. §1359, which says that a federal court shall not have jurisdiction where a party "by assignment or otherwise, has been improperly or collusively made or joined to involve the jurisdiction of such court."

PUBLIC LAW 92-562
92nd Congress, S. 216
October 25, 1972

AN ACT

86 STAT. 1176

To permit suits to adjudicate certain real property quiet title actions.

Real property quiet title actions. Adjudication. 62 Stat. 933; 80 Stat. 1148. Jurisdiction. Infra.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 1346 of title 2S, United States Code, is amended by adding at the end thereof the following ne wsubsection:

"(f) The district courts shall have exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States."

SEC. 2. Section 1402 of title 28, United States Code, is amended by adding at the end thereof the following new subsection:

"(d) Any civil action under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States shall be brought in the district court of the district where the property is located or, if located in different districts, in any of such districts."

SEC. 3. (a) Chapter 161 of title 28, United States Code, is amended by adding after section 2409 of such title the following new section:

62 Stat. 970;
80 Stat. 304.

"§2409a. Real property quiet title actions

"(a) The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands, nor does it apply to or affect actions which may be or could have been brought under sections 1346, 1347, 1491, or 2410 of this title, sections 7424, 7425, or 7426 of the Internal Revenue Code of 1954, as amended (26 U.S.C. 7424, 7425, and 7426), or section 208 of the Act of July 10, 1952 (43 U.S.C. 666).

68 Stat. 1241;
84 Stat. 449.
80 Stat. 1140.
66 Stat. 560.

"(b) The United States shall not be disturbed in possession or control of any real property involved in any action under this section pending a final judgment or decree, the conclusion of any appeal therefrom, and sixty days; and if the final determination shall be adverse to the United States, the United States nevertheless may retain such possession or control of the real property or of any part thereof as it may elect, upon payment to the person determined to be entitled thereto of an amount which upon such election the district court in the same action shall determine to be just compensation for such possession or control.

"(c) The complaint shall set forth with particularity the nature of the right, title or interest which the plaintiff claims in the real property, the circumstances under which it was acquired, and the right, title, or interest claimed by the United States.

"(d) If the United States disclaims all interest in the real property or interest therein adverse to the plaintiff at any time prior to the actual commencement of the trial, which disclaimer is confirmed by order of the court, the jurisdiction of the district court shall cease unless it has jurisdiction of the civil action or suit on ground other than and independent of the authority conferred by section 1346(f) of this title.

Supra.

"(e) A civil action against the United States under this section shall be tried by the court without a jury.

86 STAT. 1177

Statute of limitations.

"(f) Any civil action under this section shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.

"(g) Nothing in this section shall be construed to permit suits against the United States based upon adverse possession."

(b) The chapter analysis at the beginning of chapter 161 of title 28, United States Code, is amended by inserting after the item relating to section 2409 the following new item:

"2409a. Real property quiet title actions."

Approved October 25, 1972.

LEGISLATIVE HISTORY:
HOUSE REPORT NO. 92-1559 (Comm. on the Judiciary).
SENATE REPORT No. 92-575 (Comm. on Interior and Insular Affairs).
Congressional Record:
  Vol. 117 (1971): Dec. 11, considered and passed Senate.
  Vol. 118 (1972): Oct. 12, considered and passed House, amended.
    Oct. 13, Senate concurred in House amendment.

THE COURT:

OPINION ON MOTIONS FOR DISMISSAL

U.S. District Court
Northern District of Mississippi
No. GC 7281-K
Filed Nov. 22, 1972

Gentlemen, this is the ruling of the Court. First, as to the motion of the United States to dismiss, it is overruled on the ground that this Court has jurisdiction over suits of this type against the United States, and of course the six-year statute of limitations is no longer applicable. The Court is further of the view that as between these private litigants, although there appears to be requisite diversity, that the state law questions regarding titles to real estate predominate in this case and it is an area in which the Chancery Court of Humphreys County and the Mississippi Supreme Court has expertise and the parties should repair to those courts for a determination of these questions.

Now, that can be done either by the plaintiffs filing suit in chancery court or by the individual defendants filing suit to confirm their title. The door is open either way. Therefore, the Court believes that in the exercise of proper jurisdiction considerations and to have due respect to "our federalism," to use Mr. Justice Black's statement, that this is a proper case for abstention and that the private litigants should repair to the Humphreys County Chancery Court for the resolution of this dispute.

The suit, however, will remain docketed in this case with no parties dismissed at this time, pending the determination of this question in the state courts of Mississippi. When that is done, then the litigants will make known the issues, the Court will then take the law question as decided by the state courts and apply it in any further litigation in this Court to determine the rights of the United States, determine the right of the United States against any third party defendants.

I am making this ruling because I do not see any semblance of a federal question in the case at all. It is simply the United States as the holder of the easement. But that does not make it a federal question case. And a of the questions are state law questions and they are not only that but they involve title to real property that is of a complex nature and the types of disputes that the chancery courts of this state are eminently qualified to resolve.

JERRY L. KELLEY
Official Court Reporter
United States District Court

ORDER ON MOTIONS FOR DISMISSAL

U.S. District Court
Northern District of Mississippi
No. GC 7281-K
Filed 11-28-72

On the hearing of the motion of the United States of America to dismiss the action for lack of jurisdiction, the Court finds that 28 U.S.C. 2410, as amended, and related statutes, confer jurisdiction and this motion should be overruled.

On the hearing of the motions of the individual defendants to dismiss the action for lack of jurisdiction, the Court finds that it has pendent jurisdiction without regard to diversity of citizenship and the requested dismissal should be denied.

The Court further finds, however, that this action, seeking, as it does, the adjudication of conflicting claims to the ownership of and interest in land, involves no federal questions on its merits but does involve uncertain and complex state land law issues which should be settled by state courts in the particular circumstances of this case and that this Court should abstain from exercising jurisdiction pending the settlement of the state issues in the appropriate state forum and that further proceedings herein should be suspended.

IT IS, THEREFORE, ORDERED AND ADJUDGED:

1. That the motions to dismiss be and the same are hereby overruled.

2. That all proceedings in this cause in this Court be and the same are hereby suspended, pending the further orders of the Court.

3. That if no suit is filed by any party in the appropriate state forum for determination of the state issues within ninety (90) days from the date of this order, a motion to reactivate the proceedings herein may be presented by any interested party.

4. That when any suit filed in the state forum results in a final judgment on the issues involved, this Court will proceed to a final disposition of this action and grant such relief as may then be appropriate.

SO ORDERED on this *28* day of *November*, 1972.

AMENDMENT TO ORIGINAL COMPLAINT

U.S. District Court
Northern District of Mississippi
No. GC 7281-K
Filed 12-21-72

The defendants having failed to plead responsively to the complaint, as contemplated by Rule 15(a), of the Federal Rules of Civil Procedure, plaintiffs file this their amendment to the original complaint, and say:

I.

This amendment seeks only to add to the original complaint this paragraph, showing the bases of federal jurisdiction relief upon. Such jurisdiction is invoked first on the ground that the defendants, in conjunction with the acts of state officials of the State of Mississippi, have deprived plaintiffs of their property in violation of the due process clause of the Fifth and Fourteenth Amendments of the United States Constitution, 28 U.S.C. 1331; plaintiffs and defendants are residents of different states and the matter in controversy exceeds, exclusive of interests and costs, the amount of $10,000.00, 28 U.S.C. 1332; plaintiffs have been deprived of their Civil Rights by state action, 28 U.S.C. 1343 and 42 U.S.C. 1983-1985; and because the United States has an interest in the lands in question, having unlawfully acquired such interest from the defendants less than 12 years from this date; it is a necessary party, and in such case Congress and the President conferred *exclusive* original jurisdiction upon this Court to hear and determine the issue, 28 U.S.C. 1346(f), 28 U.S.C. 1402(d) (as amended), and 28 U.S.C. 2409 a (which is the amendment effective October 25, 1972).

MOTION TO RECONSIDER ABSTENTION RULING, AND FOR OTHER RELIEF

U.S. District Court
Northern District of Mississippi
No. GC 7281-K
Filed 12-21-72

Now come plaintiffs and move the Court as follows:

1. Plaintiffs move the Court to reconsider and to change the Order on Motions for Dismissals heretofore entered on the 28th day of November, 1972, wherein this Court suspended all proceedings in this cause so that any party or parties might file suit within ninety days in the appropriate state forum for a determination of some, if not all, the issues in this case. Plaintiffs take the position that 28 U.S.C. 1346 (f) and 28 U.S.C. 1402(d), the statutes recently amended by Public Law 92-562 of the 92nd Congress, S. 216, effective October 25, 1972, entitled "An act to permit suits to adjudicate certain real property quiet title actions", confer exclusive original jurisdiction of this case upon the United States District Courts. Furthermore, aside from said exclusive jurisdiction statutes, there appear no exceptional circumstances in this case to require this Court to abstain, and for other reasons to be cited in the brief attached herewith.

2. Plaintiffs have filed an Assignment and Quit Claim Deed from Nora Key Johnson, a party plaintiff, of her interest in the property and this suit to Alf Key, another party hereto. Plaintiffs have also filed her Affidavit in connection therewith. Therefore, in accordance with Rule 21, Federal Rules of Civil Procedure, the said Nora Key Johnson and plaintiffs do herewith move that the Court enter an order allowing her to withdraw as a party plaintiff hereto.

3. If the Court should not reconsider and withdraw its order abstaining until the issues herein raised have

been decided by a State Court, then the plaintiffs pray this Honorable Court to so amend its said order suspending all proceedings so that even if the issues are presented to a state forum the parties hereto may nevertheless be allowed to rely upon and to avail themselves of all federal court discovery rules and procedures, the same as if this matter were pending for trial in Federal Court.

4. Plaintiffs believe they have a right to amend their original complaint under Rule 15(a) of the Federal Rules of Civil Procedure, because the defendants have failed to plead responsively thereto. But because this Court in its order on motions for dismissal suspended all proceedings pending further orders of the Court, plaintiffs are in doubt as to whether they may file an amendment a copy of which is attached to this Motion. Said amendment includes only a recital of the bases of jurisdiction in this Court on which plaintiffs rely. Therefore, plaintiffs move the Court for an order allowing them to file said amendment to their original complaint.

5. Plaintiffs further are uncertain as to whether the said order on Motions for Dismissal is such a final order from which they may appeal as a matter of right. Therefore, in accordance with 28 U.S.C. 1292(b), plaintiffs respectfully request the Court when acting in its order dealing with this Motion, to set forth therein that in the opinion of the Court the said order of Abstention involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of this litigation. Plaintiffs rely upon the matters and cases discussed in their brief attached hereto in support of this portion of the Motion.

AMENDMENT TO MOTION TO RECONSIDER

U.S. District Court
Northern District of Mississippi
No. GC 7281-K
Filed 2-26-73

Now come plaintiffs and file this their amendment to the motion to reconsider they have heretofore sent to the Court on the 20th day of December, 1972, and say:

1. None of the defendants have replied to said motion, nor has the Court set said motion down for hearing, or acted in any way thereupon. This motion is Supplemental to the original, and is a matter of some urgency.

2. Since the order of the Court abstaining from hearing this cause, the defendants have filed a bill of complaint against the plaintiffs in the Chancery Court of Humphreys County, Mississippi, and process has been made returnable to the March Term of the Humphreys County Chancery Court, which convenes the 19th day of March, 1973. Under the present status of this case the plaintiffs here, defendants in the State Court, are obliged to appear and answer and possibly have this case heard and determined in the March Term of the State Chancery Court.

3. Plaintiffs have moved the Court to reconsider said abstention ruling on several grounds, not the least of which is that in this case the Mississippi State Court no jurisdiction whatsoever to hear and determine this cause. At the time of the abstention ruling of the Court, on the 21st day of November, 1972, the question of jurisdiction of the State Court was neither briefed nor argued before this Honorable Court. Accompanying this motion is a supplemental brief, containing points and authorities, which very sharply focuses upon this issue.

4. As an additional ground for relief in the motion

to reconsider, plaintiffs have requested the Court to act in accordance with 28 U.S.C. 1292(b), so that this very question of jurisdiction as well as the other grounds stated in the motion, may be reviewed on appeal by the Fifth Circuit Court of Appeals. If plaintiffs are correct as to the jurisdiction points raised, and even though this Honorable Court may disagree with that position, the quickest solution to the problem for all parties is to resolve such question in the Federal Courts, before the matter has to make its way through the State Courts, then finally again be called in question in the Federal Courts. One way or another, that is, either now or at the conclusion of the State Court hearing, these questions will have to be resolved by the Federal Courts.

5. Plaintiffs thereupon call upon the Court to hear and determine this matter either before the March term of the State Chancery Court, or if not before then, then enjoin the plaintiffs from proceeding in the State Court until these matters are finally determined by the Federal Courts.

ORDER

U.S. District Court
Northern District of Mississippi
No. GC 7281-K
Filed 2-27-73

The court having considered plaintiffs' motion to reconsider its abstention ruling made in this cause October 21, 1972, and briefs in support thereof, and after being duly advised, concludes that the motion is not well taken and the suit filed by defendants in the Chancery Court of Humphreys County, Mississippi, should be allowed to proceed, but without prejudice to the ultimate determination as to the rights or interests claimed by the United States in the real property involved in said litigation.

It is further ordered that upon the final outcome of the litigation instituted by defendants in the Chancery Court of Humphreys County, counsel for plaintiff and defendants notify this court of the issues then remaining in the cause.

This, 27th day of February, 1973.

FIFTH CIRCUIT ORDER

Fifth Circuit Court of Appeals
No. 73-1962
Filed Jun 12 '73

No. 73-1962

ALF KEY, ET AL.,

Plaintiffs-Appellants,

versus

MRS. LOUISE P. WISE, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Mississippi

Before WISDOM and AINSWORTH, Circuit Judges.
BY THE COURT:

IT IS ORDERED that appellees' motion to dismiss the appeal, filed in the above styled and numbered cause, is hereby GRANTED.

IT IS FURTHER ORDERED that appellants' motion for stay of the State Court proceedings pending appeal, is hereby DENIED.

MISSISSIPPI CHANCERY COURT FINDINGS

Chancery Court of Humphreys County, Mississippi

No. 3323

Filed 10 September 1974

Suit was begun in Chancery Court of Humphreys County, Mississippi, by Louis Wise and others therein named, against Tom Key and others therein named, seeking to cancel as clouds on the title of complainants' five deeds set out in the pleadings and to adjudicate complainants to be the true owners of the lands embraced in the deeds.

The land was described by conventional governmental survey; title was shown out of the government and, by accepted muniments of title, into complainants; their respective interests were shown; adverse possession in complainants was set up, as was complainants' position as a mortgagee who entered after condition broken and who are still in possession; specific statutes of limitation were set up; the invalidity of defendants' title was set up. All by complainants' pleadings.

The pleadings of defendants reveal some several dilatory pleas which were passed on by the Court adverse to defendants and finally, the answer of defendants setting up the same pleas as affirmative defenses and likewise being a general denial of complainants' original bill.

The matter came on for hearing, which hearing was extensive, both as to time, witnesses, exhibits, and arguments of counsel.

No request under the applicable statutes or the Rules of Chancery Practice was made to the Court for either a ruling on reserved rulings made during the trial or for a finding of fact.

The Court took the matter under advisement for the rendition of a decree in vacation, after first announcing in open Court that the Court was of the opinion and was so holding that the complainants were entitled to the relief prayed for in their original bill and that a written finding of fact would thereafter be filed.

Counsel for the complainants presented a decree at that time in open Court. Whereupon counsel for the defendants requested that no decree be then entered, stating that he wished the finding of fact incorporated therein, the Court acceding thereto.

This finding thus far recites the above so as to state the real issues and place this litigation in its proper sequence.

Evidentiary, I find as a fact that the parties complainant and parties defendant, and the alleged varying interests of said complainants are as set out in the original bill, same being admitted by the answer. I further find that the correct description of the land involved is as follows:

> Lots 1, 2, and 7, Section 31, and Lot 5, Section 32, Township 15 North, Range 2 West, Humphreys County, Mississippi, less and except certain exceptions;

in that, while defendants deny the description of the land in the original bill, they thereupon allege the true description of the lands involved to be the same as shown by said bill so far as lot, section ,township, range, County and State.

I find as a fact that the parties complainant, through and by their predecessors in title, entered said lands in controversy with good and sufficient color of title and have there remained from the year 1932, thence hitherto, which occupancy has been and is hostile, actual, open, notorious, and exclusive to all others.

I find as a fact that none of the several other defenses raised by the answer; outright fraud, concealed fraud, fiduciary relationship, including but not limited to the charging of "excessive, illegal and usurious interest;" can prevail to toll the statute. This Court here makes this above disposition of these issues in the heighth of charity.

The Court is constrained to state that defendants are either unaware of certain time-honored rules as announced by our Supreme Court regarding the charging and proof of fraud, concealed or otherwise, or they have chosen to ignore the same. Fraud is not to be presumed nor is it to be lightly charged. It must be specifically charged. The bill must be sworn to. The proof must go beyond mere preponderance and rise to the dignity of clear, cogent and concise. Here, same was charged upon information and belief in loose and general language in an unsworn answer. At the trial, not a scintilla of evidence was offered in proof thereof by defendants.

I find as a fact that the last issue involved herein as going to the merits, to-wit, the effect of the mortgage of February 5, 1931, given by only Carrie Cook Key, Roscoe Key, and Thomas Key, must be resolved against the defendants for the reason that the entry above found and the possession thereafter likewise found above, constitutes a sufficient ouster of Georgia Key Bolden, Alfred Key Herman and Carrie Key Johnson, and their successors, notwithstanding the erroneous conclusion of law pled by defendants concerning the effect of said deed of trust and the quantum of interest therein conveyed.

In short, I find as a fact that complainants have prevailed by that necessary degree of the credible evidence in the establishment of the allegations of their original bill.

The Court, therefore, enters as its conclusions of law, its own Order appended hereto, with directions to the Clerk hereof to append thereto this finding, same being compatible with the earlier announced decision of the Court and this finding.

This June 13, 1974.

ERNEST KELLNER
Chancellor

Not typed and prepared for delivery on June 13, 1974. Thereafter revised to honor request of defendant to incorporate with decree. Thereafter revised as to grammar, spelling, etc., and finalized. Handed Reporter this September 10, 1974.

ERNEST KELLNER
Chancellor

MISSISSIPPI CHANCERY COURT FINAL DECREE

Chancery Court of Humphreys County, Mississippi

No. 3323

Filed 10 September 1974

This cause coming on to be heard on the Bill of Complaint of Louise Wise, Amy Wise Permenter, Fannie Wise Kortjohn, Virginia C. Wise, Louise P. Wise, Dr. Louis J. Wise, Louis Paul Fischer, Eugenia Fischer, Max J. Heinberg, III, Mrs. Pauline Heinberg Gagliano, Charles E. Heinberg, William W. Heinberg, and Mrs. Eugenia F. Heinberg; on answer of Tom Key, Jr., Louise Key Mason, Alf Key, Roscoe Key, Jr., Peter Andrew Key, Joe Alfonzia Key, Paul Key, Gilbert Johnson, also known as Gilbert Johnson, Jr., Waldo H. Herman and Georgia Key Bolden; on pleading styled: "Disclaimer of Certain Separate Defendants" filed by Katherine Key Hall, Liddie Key, also known as Liddie Moore Key, Nora Key Johnson, Lynell Key Jackson, Augusta Key, also known as Augusta Strong Key, and Alfred Key Herman; on all other papers in the cause, including order for trial in vacation, filed June 5, 1973, order taking the cause under advisement for decision filed June 25, 1973, and order dated and filed June 13, 1974; and on oral and documentary evidence; and having heard all the same, together with the arguments and written briefs of counsel, and being now fully advised in the premises, the Court is of the opinion and so finds, that the complainants are entitled to the relief prayed for in their "Original Bill of Complaint to Cancel Clouds on Title"; it is, therefore,

ORDERED, ADJUDGED, AND DECREED that the following described lands located in Humphreys County, Mississippi, being the lands sued for herein, to-wit:

> Lots 1, 2, and 7 of Section 31; and Lot 5 of Section 32; all in Township 15 North, Range 2 West, containing 451 acres, more or less; subject to: (1) perpetual easements for benefit of the United States, recorded in Book 59 at Page 245 and Book 64 at Page 126 of the deed records, said county; (2) oil, gas and mineral lease evidenced by instrument recorded Book 78 at page 181, said records; and (3) rights of way for public roads and utilities heretofore placed upon said lands.

are, and the same are hereby declared to be the property of the complainants as their interests appear in the pleadings, to-wit: Louis Wise, Amy Wise Permenter, Fannie Wise Kortjohn, and Virginia C. Wise, as to an undivided three-fortieths (3/40th) interest each; Max J. Heinberg, III, Pauline H. Gagliano, Charles E. Heinberg, William W. Heinberg, and Mrs. Eugenia F. Heinberg as to an undivided one-twenty-fifth (1/25th) interest each; Louis Paul Fischer and Eugenia Fischer, as to an undivided one-tenth (1/10th) interest each; Dr. Louis J. Wise as to an undivided three-tenths (3/10ths) interest, but subject to a life estate for the benefit of Louise P. Wise in and to an undivided one-tenth (1/10th) of the oil, gas and other minerals appertaining to the Dr. Louis J. Wise interest, remainder on the death of the life tenant to Dr. Louis J. Wise; and that the defendants Tom Key, Jr., Louise Key Mason, Alf Key, Roscoe Key, Jr., Peter Andrew Key, Joe Alfonzia Key, Paul Key, Gilbert Johnson, also known as Gilbert Johnson, Jr., Waldo H. Herman, Georgia Key Bolden, Katherine Key Hall, Liddie Key, also known as Liddie Moore Key, Nora Key Johnson, Lynell Key Jackson, Augusta Key, also known as Augusta Strong Key, and Alfred Key Herman, and each of them, have no right, title or interest in said lands or any part thereof; and that every such claim heretofore asserted by said defendants, or any one of them, to said lands or any part thereof, be held for naught and is hereby wholly cancelled.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED the following deeds be and they hereby are cancelled as clouds on the title of these complainants, which deeds are:

(a) Deed of Alfred Key Herman to Waldo H. Herman, dated September 3, 1970, filed for record October 16, 1972, and recorded Book 86 at Page 219 of the Deed Records of Humphreys County, Mississippi.

(b) Deed of Katherine Key Hall to Louise Key Mason dated September 7, 1970, filed for record October 16, 1972, and recorded in Book 86 at Page 221 of the records, said county.

(c) Deed of Augusta Strong Key and Lynell Key Jackson to Alf Key, dated December 16, 1970, filed for record October 16, 1972, and recorded Book 86 at Page 223 of the Deed Records, said county.

(d) Deed of Nora Key Johnson to Alf Key, dated November 27, 1972, filed for record December 4, 1972, and recorded in Book 86 at Page 498 of the Deed Records, said county.

The Clerk of this Court is directed to enter upon the margin of the Deed Records of Humphreys County, Mississippi, at the respective places of recordation of said deeds, the cancellation of each by reference to this decree.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the costs of this proceedings are taxed against the defendants, for which let execution issue.

ORDERED, ADJUDGED, AND DECREED, this the 13th day of June, 1974.

ERNEST KELLNER
Chancellor

PETITION FOR A WRIT OF MANDAMUS

Fifth Circuit Court of Appeals

No. 76-2394

Filed May 21, 1976

The petition of Alf Key et al, hereinafter referred to as plaintiffs, respectfully shows that:

1. The complaint (app. 1-8) was filed in the cause on the 21st day of July 1972 against Mrs. Louise P. Wise and twelve other individual defendants as descendants of two members of a partnership, and against the United States of America. The suit seeks to recover possession of, and quiet title to, approximately 451 acres of land in Humphreys County, Mississippi, and within the jurisdiction of the Greenville Division of the United States District Court for the Northern District of Mississippi. Jurisdiction was based upon diversity of citizenship.

2. The defendants, by motions to dismiss, (App. 8-14) challenged the fact of the diversity between the parties.

3. Prior to a hearing upon said motions to dismiss, Public Law 92-562 (App. 15-16) of the 92nd Congress, S. 216, 86 Stat. 1176, became the law of the land, effective date the 25th day of October 1972. By that Law, the district courts were given exclusive original jurisdiction of civil actions to quiet title to an estate or interest in real property in which an interest is claimed by the United States.

4. In this case, the United States claims a substantial interest in the 451 acres of land in question, by virtue of two perpetual easement deeds from the Wise defendants, to the U.S.A., for the purpose of building a levee.

The land in question is situate upon the banks of the Yazoo River, and at such point, said river is a navigable stream. A levee has been built upon the land in question, by the United States Corps of Engineers.

5. On the 28th day of November 1972, after due notice to all parties and all parties being there represented, District Judge William C. Keady held a hearing in Greenville upon the motions to dismiss. During the hearing, the assistant United States Attorney called Washington, D.C., by telephone, and then and there had Public Law 92-562 read to the Judge and all parties, said statute apparently then being new to all concerned. After hearing the statute read over the telephone, and hearing the arguments of the party litigants, Judge Keady decided that the motions to dismiss should be overruled, that the Court did have jurisdiction, but that the Court should abstain from hearing the case until either the Keys or the Wises should file suit in state court and obtain a state court decision as to the issues. (App. 17). Thereupon, the Court entered its order upon said ruling (App. 19).

6. Thereafter, plaintiffs obtained a copy of Public Law 92-562, and on the 21st day of December 1972, filed their amendment to the original complaint (App. 20), resting jurisdiction upon several other grounds, including the fact that said Public Law 92-562 conferred exclusive original jurisdiction upon the district court below.

7. On the 21st day of December 1972, plaintiffs filed their motion to reconsider the abstention ruling, and for other relief, based primarily upon Public Law 92-562. Among the other relief sought was that even if

plaintiffs must try their case in state court, that the parties be allowed to rely upon and to avail themselves of all federal court discovery rules and procedures (App. 21).

8. By an amendment to the motion to reconsider (App. 24), filed the 26 day of February 1976, plaintiffs showed that the Wise defendants had initiated a state court action, and prayed that said action be enjoined.

9. Then by its order dated 27 February 1973, without a hearing thereon, Judge Keady overruled plaintiffs' motion to reconsider, and concluded that the state court action should be allowed to proceed, *but without prejudice to the ultimate determination as to the rights or interests claimed by the United States in the real property involved in said litigation.* (App. 25).

10. Plaintiffs thereupon appealed the decision of Judge Keady to the Fifth Circuit Court of Appeals. On the 12th day of June 1973, Judges Wisdom and Ainsworth sustained a motion to dismiss the appeal, and denied plaintiffs' motion to stay the state court proceedings. (App. 27).

11. The state court trial, in the Humphreys County Chancery Court, began on the 19th day of June 1973, and lasted four days. Obviously, the Wises gave the Keys practically no time to prepare for trial. One extremely important disadvantage to the Keys (plaintiffs here) was that the Mississippi Chancellor refused to allow them to discover the all important books and records of the Wise Brothers! The District Judge had also refused a request for discovery rights. (App. 22-23).

12. After the trial in June 1973, the State Chancellor took the matter under advisement and kept it in the

bosom, as far as plaintiffs are concerned, until June 13, 1974, at which time he entered an order that complainants (the Wises) were entitled to the relief prayed for, but continuing the case under advisement for entry of the court's opinion and final decree.

13. Thereafter, on 10 September 1974, the state court finally filed its findings (App. 28) and final decree (App. 32), some 15 months after the trial began.

14. Within the time allowed by law, the Keys perfected their appeal from the decision of the state court, which they verily believe is clearly erroneous in a number of important respects. A most obvious error, was that the state court refused to apply the 12 year statute of limitations, as provided by Public Law 92-562, but used instead the state court 10 year statute. It appears that the only claim the Wises have to the property is upon an adverse possession claim to themselves. The facts show that the claim of the United States rests upon a deed filed more than 10, but less than 12 years before this suit was filed; that one of the Key tenants in common lived upon the land, in exclusive possession thereof, until he died in 1970, and it was not until after his death that the Wises ever got their first possession of the property.

15. The outcome of the state court proceedings presently rests in the bosom of the Mississippi Supreme Court. As yet, the case has not been set for argument, though argument has been requested. The end is not in sight.

16. Many issues needed to be raised in the Mississippi Supreme Court including the question whether Mississippi State Courts have any jurisdiction to try the case.

However, that Court limited the Keys to 50 pages in their written brief. Some important points had to be left unargued.

17. In the light of the order of Judge Keady dated 27 February 1973 (App. 25), in effect ordering the Mississippi State Court not to prejudice the rights of the United States (which was not a party to the State Court action), it would have been rather awkward for the Mississippi Chancellor to decide the case in favor of the plaintiffs (Keys), from whom the United States has no deed to the property in question.

18. These plaintiffs (Keys) believe so strongly that the state court should not have been allowed to try the issues in this cause, and that the state court lacked jurisdiction to try all the issues, that they did not attempt to further confuse the jurisdiction problem by filing a cross-action against the Wises.

19. The state court action could not, nor did it attempt to, try all the issues. It omitted many necessary parties, including the United States. The Keys believed that they were prevented from filing a cross complaint, which would have had to make the United States a party.

20. The basis of this mandamus action may be summarized as follows:

(a) There was no motion made for the stay action by Judge Keady; it was ordered by the Court, without first allowing any party to argue for or against it.

(b) There was at the time of the stay order no action pending in any other court between the parties regarding the issues.

(c) This is primarily a suit in rem, and the rule adopted by the United States Supreme Court that the first court which assumes jurisdiction acquires exclusive jurisdiction, was not followed.

(d) The stay was not effected to avoid a federal constitutional question, when it might be disposed of on questions of state law.

(e) The stay was not effected to avoid needless conflict with the administration by a state of its own affairs.

(f) There are no unsettled questions of state law applicable to this case. Most of the issues revolve around whether the Wises ever acquired the property by adverse possession—issues which have been spoken to many many times by the Mississippi Supreme Court.

(g) There exists no exceptional circumstances warranting a stay, such as some recognized public policy or defined principle.

(h) At the time of the stay, and the state court trial, there existed in the Mississippi State Courts no broad discovery proceedings, as was available in the federal courts.

(i) Under Mississippi law, the law used in the state court trial of these issues, the statute of limitations is ten years; the limitations under Public Law 92-562 which should have been controlling in this case, is twelve years.

(j) And finally and more importantly than all the other reasons here advanced, Public Law 92-562 confers *exclusive* original jurisdiction to try the issues in this case upon the United States District Court for the Northern District of Mississippi, Greenville Division.

(k) Plaintiffs do not here attempt to argue the case for the United States, but a point ought to be made, especially in view of the fact that the U. S. Attorney has refused to confer with plaintiffs in this regard. Suppose the state court should decide the issues in favor of plaintiffs, in which case the United States would own no interest in the lands in question. In view of Public Law 92-562, would such a decision by the state court be binding upon the government? Are they not entitled to be heard upon all the possession and ownership issues by the U. S. District Court?

21. To the expected suggestion to the Court that this matter might well have been brought before the Court sooner, plaintiffs admit the truth thereof. But the case is still undecided; the issue of jurisdiction has to be met and resolved at some point. Even after a decision by the Mississippi Supreme Court, the matter still has to be decided by the U. S. District Court, and after that, the jurisdiction question presented to the Fifth Circuit Court on Appeal. The issue was presented to this Court on appeal, from the stay order of Judge Keady but the appeal was dismissed, without a decision thereon.

22. And the appeal was not res adjudicata to the issues. In *Mottoleso v. Preston*, 172 F2d 308, a Second Circuit case, the plaintiffs there challenged a stay order entered by Judge Kaufman. That appeal was dismissed by the Second Circuit, but the Court did suggest that mandamus was the proper way to present the issue to the appellate Court. Thereafter, in *Mottolese v. Kaufman*, 176 F 2d 301 (2nd Cir 1949) in a key opinion by Judge Learned Hand, the jurisdictional question as to the stay order, was presented by mandamus, and decided.

23. These plaintiffs have been much aggrieved by the stay order of Judge Keady, have been caused to go to much extra expense, have been delayed in having their issues presented fairly to the Court for a determination thereof, and have been wrongly prevented from enjoying the fruits of their lands.

WHEREFORE, petitioners pray:

(1) That an order be issued, directed to the said Honorable William C. Keady, Judge of the United States District Court for the Northern District of Mississippi, requiring him to show cause in this Court, at a time to be designated, why he should not execute the mandate of this Court, and vacate so much of the order on motions for dismissal (App. 19) which stays or suspends this federal court suit and allows the Wises to file suit in state court for a determination of the issues; and to vacate so much of the second order (App. 25) which overruled plaintiffs' motion to reconsider and to enjoin the Wises from proceeding with the state court action.

(2) That a writ of mandamus issue from this Court directing the Honorable William C. Keady to execute the mandate of this Court, to vacate so much of the said order on motions for dismissal (App. 19) which stays or suspends this federal suit in state court for a determination of the issues; and to vacate so much of the second order below (App. 25) which overruled plaintiffs' motion to reconsider and to enjoin the Wises from proceeding with the state court action; and to enjoin the Wises from proceeding further with the said state court action.

(3) In the alternative, these plaintiffs or petitioners pray that this Court enjoin the Wise defendants or respondents forthwith from proceeding with the state court

action, lest petitioners be caused to undergo more expense to argue the matter orally before the Mississippi Supreme Court when a date is set for such arguments.

(4) That plaintiffs have such additional relief or process as may be necessary and appropriate in the premises.

Respectfully submitted,

C. M. MURPHY
Attorney for Petitioners
308 Dermon Building
Memphis, Tennessee 38103

FIFTH CIRCUIT ORDER

Filed May 24, '76

No. 76-2394

In Re:

ALF KEY, ROSCOE KEY, JR., PETER ANDREW KEY, JOE ALFONZIA KEY, PAUL KEY, TOM KEY, JR., LOUISE KEY MASON, GEORGIA KEY BOLDEN, WALDO H. HERMAN AND GILBERT JOHNSON,

Petitioners.

On Petition for Writ of Mandamus to the United States District Court for the Northern District of Mississippi

Before GODBOLD, DYER and RONEY,
Circuit Judges.

BY THE COURT:

IT IS ORDERED that the petition for writ of mandamus is denied.

FIFTH CIRCUIT ORDER

Filed June 28 1976

No. 76-2394

IN RE:

ALF KEY, ROSCOE KEY, JR., PETER ANDREW KEY, JOE ALFONZIA KEY, PAUL KEY, TOM KEY, JR., LOUISE KEY MASON, GEORGIA KEY BOLDEN, WALDO H. HERMAN and GILBERT JOHNSON,

Petitioners.

Appeal from the United States District Court for the Northern District of Mississippi

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

Before GODBOLD, DYER and RONEY, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition for Rehearing En Banc is DENIED.

THE SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

December 13, 1976

Charles M. Murphy, Jr., Esq.
308 Derman Building
Memphis, TN 38103

Re: Alf Key, et al.
v. William C. Keady, United States
District Judge for the Northern District
of Mississippi, et al.
No. 76-452

Dear Sir:

The Court today denied the petition for a writ of certiorari in the above-entitled case.

Very truly yours,

MICHAEL RODAK, JR., Clerk
By

Helen Taylor
Assistant Clerk

THE SUPREME COURT
OF THE STATE OF MISSISSIPPI
OPINION OF MISSISSIPPI SUPREME COURT

No. 48965

Filed 2-2-77

This is an appeal by Tom Key, Jr., and others, from a decree of the Chancery Court of Humphreys County canceling their claims to certain Humphreys County real estate as "doubts, clouds or suspicions" upon the title of appellees, Louis J. Wise, and others, thereto.

The Keys, as descendants and heirs at law of Alf Key and Carrie Key, deceased intestate, claimed the property by inheritance from them. The Wises, appellees here, claimed that they had entered the land under color of title and had become and were the owners thereof by adverse possession for more than 31 years and that the claims of ownership by the Keys constituted clouds upon their title which they were entitled to have cancelled or removed.

A great deal of evidence, oral and documentary, was submitted to the chancellor by both sides, resulting in a six volume record in this Court. From this record it appears that the case was well tried and it has been thoroughly briefed and argued here.

It is the contention of appellees that they entered the land under color of title prior to 1932, that since then they have been in the actual possession thereof for the entire period which has since elapsed, such possession having been open, visible, notorious, uninterrupted, continuous, peaceful, hostile, exclusive and adverse, claiming to be the owners thereof as against all the world, that by virtue of such possession for more than 31 years their title has matured and has been established and that all right, title and interest of appellants to the land, if any, is now barred and precluded.

Accepting as established, as we must, all that the evidence proved or reasonably tended to prove which supports the chancellor's decree, as well as all inferences favorable thereto which reasonably may be drawn from the evidence, we are unable to say that the chancellor, as trier of facts, was manifestly wrong in finding that title had matured in appellees by their adverse possession of the land for more than the statutory period of 31 years and that the claims of appellants had become barred. The evidence was sufficient to support the factual conclusion that the possession of the land by appellees, under color of title, fulfilled in essential particulars the criteria laid down by this Court in *Quates v. Griffin*, 239 So.2d 803 (Miss. 1970), modifying *Nichols v. Gaddis and McLaurin* 222 Miss. 207, 75 So.2d 625 (1954), a case in which substantially similar issues were involved.

Finally, the Keys contend that a Federal statute [28 U.S.C. § 2409 a (Supp. 1976) extended the period necessary to establish title by adverse possession from 10 years, the minimum required by the Mississippi statute to 12 years, and also deprived the Humphreys County Chancery Court of jurisdiction. This was asserted, in substance, in a suit filed by the Keys in the U. S. District Court in July, 1972, in which the United States was made a defendant and which was predicated upon the conveyance by the Wises to the United States in August, 1961, of an easement for a dam which actually was constructed on the land by the U. S. Corps of Engineers in 1962.

28 U.S.C. §2409 a provides, in part:

> (a) The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, ...
>
> (b) The United States shall not be disturbed in possession...pending a final judgement or decree,...and if the final determination shall be adverse to the United States, the United States

> nevertheless may retain such possession...upon payment...of...just compensation for such possession or control.
>
> (c) The complaint shall set forth with particularity the nature of the...interest claimed by the United States.

The statute contains a 12 year limitation upon commencement of an action under its provisions:

> (f) Any civil action under this section shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.

In the present case there is no "interest claimed by the United States" which is controverted by the Wises and the United States is not a party. The quoted statute does not apply in disputed between private parties as to the private ownership of land or deprive the Mississippi courts of jurisdiction of litigation involving the interests of private persons in Mississippi real estate.

In the Keys' United States District Court suit the district judge declined to proceed and entered an order holding it in abeyance pending the outcome of the present litigation between the Keys and the Wises. Upon final termination of this suit the District Court doubtless will proceed with the disposition of the Keys' suit in which the United States is a defendant.

The decree appealed from must be affirmed.

MOTION OF WISE TO DISMISS FEDERAL COURT SUIT

U.S. District Court
Northern District of Mississippi
No. GC 7281-K
Filed 6-2-77

Now come the individual defendants, exclusive of the United States of America, namely Mrs. Louise P. Wise, Dr. Louis J. Wise, Jr., Louis Wise, Mrs. Fannie Wise Kortjohn, Mrs. Amy Wise Permenter, First National Bank of Huntsville, Alabama, Executor and Representative of the Estate of David Wise, deceased, Max J. Heinberg, III, Mrs. Pauline Heinberg Gagliano, Charles E. Heinberg, William W. Heinberg, Mrs. Eugenia F. Heinberg, Louis Paul Fischer and Eugenia Fischer, hereinafter collectively called "Wise" and respectfully move the Court to dismiss the Complaint of the plaintiffs, Alf Key, Roscoe Key, Jr., Peter Andrew Key, Nora Key Johnson, Joe Alfonzia Key, Paul Key, Tom Key Jr., Louise Key Mason, Georgia Key Bolden, Waldo H. Herman, and Gilbert Johnson, hereinafter collectively referred to as "Key", as against the individual defendants, and for cause would show the following:

1. All issues on the merits tendered by the Complaint have been litigated in and decided by the Chancery Court of Humphreys County, Mississippi, in Cause No. 3323 on the docket of that Court, and a Final Decree was entered in that court dated June 13, 1974.

2. The Final Decree of the Chancery Court of Humphreys County, Mississippi, referred to above, cancelled the claims of Key to the title and ownership of the tract of land involved as "doubts, clouds, or suspicions" upon the rightful title and ownership of Wise; and said Decree declared the title and ownership of said lands to be vested in Wise.

3. The tract of land involved in the Chancery Court action, referred to above, is the same tract of land as that involved in this Cause No. GC7281-K.

4. The Final Decree of the Chancery Court of Humphreys County, Mississippi, referred to above, was appealed by Key to the Supreme Court of Mississipi and said Decree was in due course reviewed and affirmed by the Supreme Court of Mississippi and said Court in due time considered and denied a Petition for Rehearing, and the said Chancery Court Decree is final. (341 So. 2d 1326)

5. The said Decree of the Chancery Court of Humphreys County, Mississippi, is res judicata of all issues as between the individual parties in this cause and no case or controversy remains for trial in this court except as to any issue which may remain exlusively as between the United States of America, a co-defendant claiming a levy easement through Wise, but Wise does not dispute the right, title and interest claimed by the United States of America and there is no issue existing as between Wise and the United States of America.

AFFIDAVIT AS TO PREJUDICE OF MISSISSIPPI TRIAL JUDGE (CHANCELLOR)

Filed 6-23-77

STATE OF TENNESSEE

COUNTY OF SHELBY

The undersigned, C.M. Murphy, makes oath as to the following facts and things, to-wit:

The trial of this cause took place in the Humphreys County Courthouse at Belzoni, Mississippi, before Chancellor Ernest Kellner, of Greenville, Mississippi. The trial began on 19 June 1973 and ended on Friday the 22nd day of June 1973, at which time the Chancellor entered an order taking the cause under advisement. (R.710-711). Appearing for the Keys as counsel was the undersigned, and no one else. Appearing for the Wise plaintiffs as counsel were Mr. Walter R. Bridgforth, Mr. H.M. Love and another young lawyer, all from Yazoo City; Mr. Vardeman S. Dunn of Jackson; and Mr. Hugh R. Varnado Jr., of Belzoni, Mississippi. At the time of said trial, neither the Keys nor the undersigned had any knowledge of the connection hereafter to be described, between Chancelor Kellner and Mr. Hugh Varnado.

Sometime after the first of the year of 1974, about January, February, or March, the undersigned was informed from a very good and knowledgeable source, which he verily believes to be true, and so charges as a fact, that Chancellor Kellner, who resides in Greenville, had certain financial needs which he could not fulfill in Greenville, and therefore applied for and was granted a loan from the Bank of Belzoni in Belzoni, Mississippi, in the amount of several thousands of dollars. By the 1st of January 1974, said loan had long become overdue, and Chancellor had failed to respond to demands from the Bank to pay that which he had promised to pay.

The said Hugh R. Varnado Jr., at the time of the loan being made, and at all times material hereto, was the attorney for the Bank, was an officer thereof, and, the undersigned believes, owned a considerable amount of stock in the Bank. The Bank officials, after the said loan became overdue, and during the pendency of the decision in this case by the Chancellor, had been routinely requested to take the necessary legal steps to collect the debt. The undersigned was informed that though Mr. Varnado may have spoken to the Chancellor about repaying the said loan, he made it clear to the Bank officials, and probably the Chancellor, too, that he would bring no legal action to collect same. The undersigned was even asked whether he would bring legal action against the Chancellor.

The next thing the undersigned heard about this case was a letter from Mr. Walter R. Bridgforth, dated 5 June 1974, enclosing a letter from Hugh R. Varnado Jr., advising that the Chancellor had requested him to notify all lawyers to appear before him on 13 June 1974 for an announcement.

Thereafter, on 13 June 1974, the Chancellor entered an order by which he announced he had determined that the Wises were entitled to the relief they prayed for, and that the cause would be further continued for a written finding of fact and a final decree.

Before that written finding of fact and final decree had been filed, the undersigned, for the Keys, (R714-716) filed a written motion requesting the Chancellor to recuse himself on the grounds herein referred to, and a copy of said motion was mailed directly to the Chancellor, about the 3rd day of September 1974. The motion requested a hearing as soon as possible. On 10 September 1974, a week later, the Chancellor filed his "Findings" and the Final Decree in this cause, but dated them back to 13 June 1974 for some reason. A hearing was never set on above motion; nor was it ever acted upon.

The undersigned has practiced law since April 1948, and is well and truly familiar with the Mississippi law appertaining to adverse possession. He verily believes that the Wises so clearly failed to prove a case of adverse possession that only a biased and/or prejudiced judge could possibly have decided otherwise. It is also obvious that this case was not reviewed by the Supreme Court of Mississippi, as it was legally under a duty to do.

The Chancellor, in his Findings (R718-721), found facts about which there was no real issue: i.e., the names of the parties, the description of the land. He said he announced his holding at the conclusion of the proof, but he did not make such an announcement in the presence of the undersigned, and such an announcement is not in the record. He said that no request was made for a finding of fact by the Keys, but the record (R703) shows a request was so made. He said that no request was made as to reserved rulings, but the record clearly shows that the Keys were prevented from so moving (R701-703), by the Chancellor.

Counsel for the Wises did present a final decree for entry on June 13, 1974 (one year after the case was tried), just as if they had prior knowledge of the ruling of the Chancellor. It was not entered at that time.

The Chancellor found that the Wises entered said lands with good and sufficient color of title and remained there since 1932. That finding is not supported by any evidence. Though the proof showed the land was sold in 1932 for 1931 taxes to the Wise agent, that tax deed did not mature and was not issued until September 1934. And there is not even a suggestion in the record that the Keys were disturbed in their possession by anybody in 1932; in fact the record shows that plaintiffs, or some of them, remained in possession until 1970. This finding is so wrong, that it appears to be a deliberate fraud on the Keys, and an absolute travesty upon justice.

Next the Chancellor, in his findings, chides the Keys for not proving usurious interest, or that the debts secured by the deeds of trust to the Wises were not paid for. This Chancellor has the effrontery to make such an allegation, when he was the very force which prevented the Keys from studying the books and records of the Wises.

Next the Chancellor in his findings, says that the entry of possession by the Wises in 1932, and their continued possession thereafter, constitutes an ouster of all the other defendants. Maybe that result would follow, if the Wises did enter in possession in 1932 (which they assuredly did not), or if they thereafter remained in possession (the proof showed they never took possession until 1970). But in that case, there would be no need to use the term "ouster", which is appropriate only when one tenant claims adversely against another.

Thus the findings were based upon two false facts: that the Wises entered into possession in 1932, and that they remained there ever since. If the record fails to support those two facts, and the undersigned verily says under oath that it does, then the conclusions and final decree of the Chancellor ought to be held for naught.

Further, the deponent sayeth not.

MOTION OF PLAINTIFFS TO DECIDE ISSUES ON STATE COURT RECORD

U.S. District Court
Northern District of Mississippi
No. GC 7281-K
Filed 6-23-77

Now come the plaintiffs, and for cause of this motion, show:

The defendants Wise have at all times taken the position that they ought to hold the land because of adverse possession. The burden of proving adverse posseession is upon him who claims it. In the state court proceedings, the complete record of which is now filed in this Court, the Wise defendants proved, and were allowed to offer as proof, every bit of evidence available to them to prove adverse possession. If their proof supports a holding of adverse possession, then they ought to have the land; if not, then the plaintiffs are entitled to it, plus rents and profits and damages taken from the land by the Wises.

Therefore, plaintiffs move the Court to decide this issue from the record cumulated in state court, considering the evidence which is relevant to the issues and disregarding that which is not, without regard to any of the rulings made by the Mississippi Chancellor or the Mississippi Supreme Court.

this case certain key questions which must be supported by the evidence if adverse possession is to be properly found. Plaintiffs take the position, without reservation, that the record does not support a favorable answer to any of such questions for the Wises.

The said defendants are challenged to show in the record any proof of the following necessary elements to their claim of adverse possession in this case, on pain of dismissal of their claim to the lands if they fail.

1. Did Alf Key, or his wife or children or any of them, live on the lands in question, and/or farm said lands from as early as 1912 until the end of the crop season in 1969? If the record shows otherwise, please refer to it.

2. Did the Wise Brothers, or their agents or successors in title, ever physically dispossess Alf Key, or his heirs, or any of them, during the above period?

3. Did the Wise Brothers, or their agents, take possession of the lands during the year 1932, as the Chancellor found? If so, refer to the proof of such in the record.

4. The record shows that Alf Key borrowed money, secured by deeds of trust on the lands, from Wise Brothers, nearly every year from 1899 until his death about 1924, and after his death, some of his heirs borrowed furnish money which was secured by deeds of trust. Does the proof show, per Exhibits 2, 3, and 4, that the widow and two of the five children of Alf Key gave deecs of trust to the Wise Brothers on the lands in question in March 1929, April 1930 and February 1931, none of which are marked paid of satisfied? Are there any other unsatisfied deeds of trust on the property after Alf Key died in 1924?

5. Does the record show that any one or more of said deeds of trust was foreclosed, or that any foreclosure thereof was ever attempted?

6. Does the record show any proof that the Wise Brothers were not paid in full the debts listed which said deeds of trust secured?

7. Does the record show that the Wise Brothers, or their agents, ever took actual possession of said lands, for the reason in whole or in part, that the debts secured by any one or more of the said 1929 and/or 1931 deeds of trust were not paid? If so, point out the parts of the record so showing.

8. Was the tax title to all the lands in question purchased in 1932 for 1931 taxes, by Louis Fischer a grandson of one partner of Wise Brothers, and a cousin of the other, and an employee of Wise Brothers, a partnership?

9. Was the deed to that tax title not issued, in accordance with Mississippi Redemption Law, until 20 September 1934? And did Louis Fischer, some 29 days later on 19 October 1934, deed the same tax title property to Wise Brothers?

10. Does the record show any record title to the property in Wise Brothers, other than the said tax title deed from Louis Fischer on 19 October 1934?

11. Does the record show that the tax purchase price of $143.48, or any other amount, was not collected from the Keys after September 1932, when the tax title was purchased?

12. Does the record show that Tom Key, a child of Alf Key, lived on the property in question from the time of his birth about 1900 until 1934? Does the record show that Tom Key continued to live on the property continuously from and after 1934, until 1967, that he continued to farm the property each year thereafter until the end of the crop season of 1969? And does the record show that Carrie Cook Key, the widow of the said Alf Key, lived on the property until her death in 1956? And did Roscoe Key, another child of Alf Key who was born on a part of the property in 1897, live on the property when he died on 11 April 1950? Were any of the descendants of the said Alf Key ever evicted or caused to be removed from the property by the Wise Brothers, or its successors or agents?

13. Had Tom Key, or Carrie Cook Key, or Roscoe Key ever been dispossessed of the property, either actually or constructively, prior to the decision by the Mississippi Supreme Court of *Gardner v. Price*, 197 Miss 831, 21 So 2d 1 (1945), decided 26 February 1945? If so, point out support for such conclusion in the record.

14. Does the record show any dealings between the Keys or any of the, and Wise Brothers, except the two tax deeds heretofore mentioned, between 1932 and up to the year 1939?

15. If the adverse possessors claim an actual possession of the lands in question, please point out in the record proof of when that actual possesion began.

16. If the adverse possessors claim a constructive possession of the lands in question, Alf Key owned only 297 acres of the property at the time of his death, he having deeded Lot 7, or 154 acres, of said lands to his wife, Carrie Cook Key, in 1906 (Ex. 1). Please point out in the record any proof that the Wises took either actual or constructive possession of Carrie's 154 acres prior to her death in 1956, and when said possession took place.

17. What proof is there, if any, in the record that Tom Key or Roscoe Key or Carrie Cook Key, or any of the other heirs or descendants of Alf and Carrie Cook Key, ever agreed to hold the property in question (or any of it) for the benefit of Wise Brothers or its successors?

18. What proof is there in the record that Carrie Cook Key or Roscoe Key was required to, or did, pay rent to Wise Brothers for the right to live on said property?

19. What proof is there in the record that any dealing between Wise Brothers (or their agents) and Tom Key were done hostilely, or without his permission or consent?

20. Is there in the record a deed from Tom Key (or any descendant of Alf Key) to the Wise Brothers or its successors?

21. What proof in the record shows that the adverse claimants had or have a rightful claim to the land?

22. Prior to 1970, what proof exists in the record

that the Wise people ever claimed the land exclusively against the heirs of Alf Key?

23. If the adverse possessors are claiming constructive possession by and through the possession of Tom Key, please point out record proof of when such possession began, after 1938 and prior to 22 July 1960.

24. Beginning at a time after the year 1938, and prior to 22 July 1960, if the proof shows the Wises obtained constructive possession of the property from Tom Key, point out the record proof, consisting of clear and convincing evidence, of what either Tom Key, Wise Brothers, or its agents, did to oust each and all Tom Key's co-tènants.

One further comment. In the state courts, the defendants have consistently refused to meet the issued raised by the above questions. Only this Court may require the defendants to address themselves to the real issues.

If the defendants are right, they could very quickly settle this case by answering the questions herein posed. They know, however, that the answers to those issues overwhelmingly defeat their claim to the land in question. For instance, in the case of *De Tenorio v. McGowan*, 364 F. Supp. 1051 (1973), decided in the Southern District of Mississippi, Mr. Vardemsn S. Dunn prevailed in a confirmation of title suit wherein his position then was diametrically opposite to the position he has taken all along in this suit.

Plaintiffs pray for justice, not a continuation of defendants' evasion of the real issues.

OPINION OF DISTRICT COURT DISMISSING COMPLAINT

U.S. District Court
Northern District of Mississippi
No. GC 7281-K

The court has before it defendants' motion to dismiss on grounds of res judicata.

The ownership of certain parcels of land situated in Humphreys County, Mississippi, is at the core of this litigation. Plaintiffs filed suit in this court on July 21, 1972, alleging federal jurisdiction under 28 USC 2409 (a), 1402 (d), and 1346 (f) by virtue of a levy easement granted to the United States by the defendants. This court, recognizing that the United States was thus involved in a matter that was essentially a dispute between private parties, found that while federal jurisdiction was properly invoked, abstention was in order to allow the private parties to establish their claims in the more appropriate forum of the state chancery courts.

Defendants prevailed in the state trial court and the decision was affirmed on appeal to the Mississippi Supreme Court. Key v. Wise, 341 So. 2d 1326 (Miss. 1977).

Plaintiffs oppose this motion to dismiss and seek to reopen issues settled in the state court litigation. This they may not do. Having had the opportunity to raise all their claims in a court of competent jurisdiction, plaintiffs have had their day in court.

There is no dispute between the defendants and the United States. The defendants have at all time recognized the validity of the easements held by the government. Thus, defendants' motion to dismiss is well taken.

Let an order issue accordingly.

This, 7th day of September, 1977.

JUDGEMENT DISMISSING COMPLAINT

U.S. District Court
Northern District of Mississippi
No. GC 7281-K

Upon finding that defendants' motion to dismiss is well taken for the reasons set forth in Memorandum Opinion this date released, it is

ORDERED

1. Defendants' motiontodismiss is herebysustained.
2. The complaint is finally dismissed with prejudice.
3. All costs are taxed to plaintiffs.

This, 7th day of September, 1977.

Alf KEY et al., Plaintiffs¢Appellants,

v.

Mrs. Louise P. WISE et al.,
Defendants¢Appellees.
No. 77-2986

United States Court of Appeals,
Fifth Circuit.

Filed 11-5-80

Claimants of land brought action against other claimants and the United States, which claimed a perpetual easement in land, in federal court basing jurisdiction on statute giving district courts the exclusive jurisdiction of civil actions to quiet title to real property in which an intirest is claimed by the United States. After the District Court abstained, private defendants in the federal court action brought state court action against the federal court plaintiffs and obtained a favorable judgment which was affirmed by the Mississippi Supreme Court. The United States District Court for the Northern District of Mississippi, William C. Keady, Chief Judge, then dismissed the federal action and plaintiffs in the federal action appealed. The Court of Appeals, Randall, Circuit Judge, held that: (1) state court determination of jurisdictional issue was conclusive, and (2) state court judgment would be given res judicata effect.

Affirmed.

Brown, Circuit Judge, filed a dissenting opinion.

Appeal from the United States District Court for the Northern District of Mississippi

Before BROWN, HILL and RANDALL
Circuit Judges

RANDALL, Circuit Judge:

This case involves title to 451 acres of land located in Humphreys County, Mississippi. Known to residents of the area as "The Point," the property is bounded on the east by Tchula Lake, a long and narrow body of water, and on the south by a meander in the Yazoo River. Appellants are descendants of Alf Key and Carrie Cook Key, who first entered into possession of the land in 1886. In February of that year, Alf Key purchased a part of the land now in dispute from Henry Powell for $1,000, and recorded the deed. In October, 1912, he purchased the remainder of the disputed land from Annie Swisher for $3,000, also recording the deed. Members of the Key family occupied and farmed the land continuously until the 1969 crop was in. Alf and Carrie Cook Key had five children, all of whom were born and raised on the property. After Alf Key died in 1924, his property passed by intestate succession to his five children and his wife. One of his sons, Tom Key, remained on and farmed the property through 1969.

Beginning about 1890, certain ancestors of Appellees (the Wises), known on this record as the "Wise Brothers", began lending "furnish money" to the Keys, taking deeds of trust on the property as security. Furnish money is money used to buy seed and other farm supplies at the beginning of each farming season, and it is normally repaid out of the proceeds of the season's crop. The deeds of trust apparently secured other obligations of the Keys to the Wises in addition to the annual furnish, although the nature of those obligations does not appear from the record.

In 1932, the property was sold for delinquent taxes to an employee and relative of the Wise Brothers, who took title in 1934 and immediately reconveyed the property to the Wise Brothers. The conveyance was recorded, but the Mississippi courts apparently viewed the tax saoe and the subsequent conveyances as void, *see* n.2, *infra.*

Late in 1969, a terminal illness forced Tom Key to leave the farm and move into town where he could be cared for. About this time certain of the Wises executed and recorded deeds purporting to convey some interest in the property to other family members. At about the time of Tom Key's death in 1970, the Wises claimed possession of the land and began renting it to others. After Tom Key died in 1970, several members of the Key family living in Mississippi executed quitclaim deeds conveying whatever interest they had in the property to other Key family members who were nonresidents of the state. These deeds were recorded. In July 1972, the Keys filed this action in the United States District Court for the Northern District of Mississippi seeking a declaration of their rights in the disputed land and relying upon diversity jurisdiction. The complaint named as defendants members of the Wise family and the United States. The United States had an interest in the property because in 1961 and again in 1963 it had acquired perpetual easements from the Wises for the purpose of constructing a levee across the property.

Both the Wises and the United States filed motions to dismiss the complaint, challenging the subject matter jurisdiction of the district court. The Wises' motion alleged that complete diversity of the parties was lacking and that the United States had not consented to suits of this nature against it. The United States' motion argued that the United States had not consented to suits against it when the United States claimed a title interest, as opposed to a lien interest, in real property; and that if the action was being brought under the Tucker Act, it was barred by the applicable six-year statute of limitation. Less than a month before a hearing on those motions was held, however, Congress enacted 28 U.S.C. § 2409a and 28 U.S.C. § 1346(f). Act of October 25, 1972, Pub.L.No. 92-562, § 216, 86 Stat. 1176 (amending 28 U.S.C. §§ 1346, 1402 and adding 28 U.S.C. § 2409a). Section 2409a contains a waiver of the Government's sovereign immunity in suits to quiet title to land in which the United States claims an interest, and section 1346(f) provides: "The district court shall have *exclusive* original jurisdiction of civil actions under Section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States" (emphasis added). The hearing was held on November 21, 1972, at which time the Act of October 25, 1972 was brought to the court's attention, although the complaint was not formally amended to rely thereon at that time. At the conclusion of the hearing, during which a representative of the Government read the new Act to the court over the telephone, the court noted that it had jurisdiction of the case, but abstained because a decision on the merits of the case would involve only state law issues. The court said: "The Court further finds, however, that this action, seeking, as it does, the adjudication of conflicting claims to the ownership of an interest in land, involves no federal questions on its merits but does involve uncertain and comples state land law issues which should be settled by state courts in the particular circumstances of this case and that this Court should abstain from exercising jurisdiction pending the settlement of the state issues in the appropriate state forum and that further proceedings herein should be suspended." Thus, the court did not dismiss the federal case, but retained jurisdiction pending the outcome of a state court suit, not then instituted, that would decide the issues of state property law. The Keys moved in the district court for reconsideration of the order of abstention, formally amending their complaint to rely on the jurisdictional provision of 28 U.S.C. § 2409a. The motion was denied, and the Keys appealed to this court. The appeal was dismissed without opinion.

In the meantime and in accordance with the suggestion of the district court, the Wises brought an action in the Chancery Court of Humphreys County, a Mississippi state court, to cancel as clouds on their asserted title the quitclaim deeds recorded by the Keys in 1970 and to adjudicate the Wises to be the true owners of the property on the basis of adverse possession. The Wises asserted two grounds for their claim to the land. One ground was that Tom Key had never repaid the debt secured by a 1931 deed of trust, which pledged the property and all the livestock, farming implements, and crops owned by Tom Key in that year. The Wises claimed that, as a consequence, their predecessors in title entered the land as "mortgagees in possession after condition broken" in 1932. Thereafter, the Wises contended, the Wise Brothers rented the property to Tom Key and he attorned to them as a tenant on the property. The Wises argued that Tom Key's tenancy was possession of the property for their benefit and adverse to the interest of the Keys (Tom Key and the other Key family members who were cotenants by virtue of Alf Key's intestate death in 1924).

The other ground upon which the Wises based their claim to the property was that they have claimed full

---

1. 28 U.S.C.§ 2409a provides, in pertinent part:

> (a) The United States may be named as a party defendant in a civil action under this section to adjundicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands, nor does it apply to or affect actions which may be or could have been brought under sections 1346, 1347, 1491, or 2410 of this title, sections 7424, 7425, or 7426 of the Internal Revenue Code of 1954, as amended (26 U.S.C. §§ 7424, 7425, and 7426), or section 208 of the Act of July 10, 1952 (43 U.S.C. § 666).

right and title to the land since 1934 under a deed from Louis Fischer, an employee of the Wise Brothers partnership and a son of one of the partners at that time. That conveyance came about in the following manner. In 1932 the disputed property was sold to satisfy delinquent taxes at an annual Humphreys County sheriff's tax sale. Mr. Fischer purchased the property at that sale for $143.48. The Keys did not redeem the property by paying the delinquent taxes within two years, as permitted by Mississippi law, and on September 20, 1934 a tax deed was delivered to Mr. Fischer. The following month, Mr. Fisscher conveyed the property to the Wise Brothers for $500. Apparently the tax sale was invalid, however, because of the failure of the President of the Humphreys County Board of Supervisors to sign the minutes of the meeting at which taxes were equalized in Humphreys County in 1931. Nonetheless, the Wises claimed that after 1934, if not before, Tom Key recognized the Wise Brothers as the true owners of the property and occupied and farmed the land thereafter as their tenant with full knowledge of and acquiescence in their claim to ownership.

The case was tried in the state court in June 1973, and on September 12, 1974 the Chancellor filed his for-

2. The Keys assert, and the Wises do not contest, that in 1945 the Mississippi Supreme Court's decision in *Gardner v. Price*, 197 Miss. 831, 21 So.2d 1 (1945), rendered the tax sale to Fischer invalid. *Gardner* involved the equalization of taxes in Humphreys County for the year 1930, whereas the delinquent taxes for which the Key property was sold were equalized in 1931. It appears from the record and from the opinion in *Gardner*, however, that the same invalid procedure was employed by the Board of Supervisors, which was responsible for the equalization of taxes, in both years. Although the Chancellor's opinion does not mention the issue, nor *Gardner*, it is evident that the Chancery Court considered that the tax sale to Fischer did not vest legal title to the property in him, and that therefore his conveyance to the Wises passed no interest to them. Instead, the Chancery Court held that the Wises acquired titled by adverse possession against the Keys. *See also Key v. Wise*, 341 So.2d 1326, 1326-27 (Miss. 1977) (affirming Chancellor's determination that the Wises acquired title by adverse possession).

3. The pertinent portions of the Chancellor's opinion are set out in note 10, *infra*.

mal findings and final decree, awarding title to the Wises. Pending on appeal to the Mississippi Supreme Court, the Keys petitioned this court in May 1976 for a writ of mandamus directing the federal district court to exercise its jurisdiction to hear the federal case. On May 24, 1976 this court denied the petition without opinion. The Keys then petitioned the United States Supreme Court for a writ of certiorari to review this court's denial of their petition for a writ of mandamus. Certiorari was denied without opinion on December 13, 1976. On February 2, 1977, The Mississippi Supreme Court affirmed the decision of the Chancery Court, *Key v. Wise*, 341 So.2d 1326 (Miss.1977) One of the assignments of error made by the Keys in their appeal to the Mississippi Supreme Court was that the Chancery Court was without jurisdiction to hear the case. The Mississippi Supreme Court, however, determined that the Chancery Court did have jurisdiction. The Keys petitioned the Mississippi Supreme Court for rehearing, which was denied.

Thereafter the Wises sought dismissal of the Keys' federal lawsuit in the district court on the basis of res judicata. The district court granted the motion to dismiss on September 7, 1977. This appeal followed.

I. *The Law of the Case Doctrine*

[1,2] The Keys have already attempted to appeal the abstention order once, without success, and they also sought a writ of mandamus from this court, which similarly challenged the propriety of the abstention. We must therefore consider whether the dismissal of the appeal and the denial of the writ preclude our examination of the propriety and effect of the abstention order. Regarding the doctrine of law of the case, we have said:

> The "law of the case" rule is based on the salutary and sound public policy that litigation

> should come to an end. It is predicated on the premise that...it would be impossible for an appellate court "to perform its duties satisfactorily and efficiently" and expeditiously "if a question, once considered and decided by it were to be litigated anew in the same case upon any and every subsequent appeal" thereof.

White v. Murtha, 377 F.2d 428, 431 (5th Cir. 1967). Whether the doctrine applies at all, therefore, depends on whether the question as to which it is asserted was decided previously in the course of litigation. No explanation for either the dismissal of the appeal or the denial of the writ of mandamus was given by the panels that ruled on those applications. Thus, we are not bound by any "law of the case" unless a determination by us concerning the propriety of abstention is necessarily inconsistent with every possible correct basis for the earlier rulings of this court.

[3] One obvious basis for the dismissal of the Keys' appeal of the abstention order that is not inconsistent with a determination by us that abstention was improper is that the earlier panel considered the order nonappealable. The abstention order did not terminate the federal case, but held it in abeyance pending the resolution of the yet-to-be-filed state court action. The appealability of such abstention orders remains an unsettled question.

[4] The denial of the Keys' petition for a writ of mandamus could also have been predicated on grounds not inconsistent with a determination that abstention was improper. The issuance of an extraordinary writ "is in large part a matter of discretion with the court to which the petition is addressed." *Kerr v. United States Dist. Ct. for N.D. of Cal.*, 426 U.S. 394, 403, 96 S.Ct. 2119, 2124, 48 L.Ed.2d 725 (1976). Although the

---

4. We would, of course, be bound by decisions of another panel that we considered to be erroneous. Where no explanation for a ruling is given, however, we presume that the ruling was not erroneous, and that presumption defines the boundaries of our law of the case inquiry.

"traditional use" of the writ of mandamus, as described by Chief Justice Stone, "[is] to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so," *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26, 63 S.Ct. 938, 941, 87 L.Ed.2d 1185 (1943), even when a jurisdictional error has been committed, review by mandamus is sometimes withheld. One reason for denying mandamus even when the applying party appears to be entitled to an appellate cure is that the "complaining party has an adequate remedy by appeal or otherwise..." *Ex parte Chicago, R.I. & Pac. Ry.*, 255 U.S. 273, 276, 41 S.Ct. 288, 289, 65L.Ed. 631 (1921). This principle was applied in this curcuit in *Belcher v. Grooms*, 406 F.2d 14 (5th Cir. 1968). There petitioners sought a writ of mandamus while an appeal was pending before the Fifth Cuicuit. The writ was denied, this court saying: "Neither the denial of the writ, nor anything we say in this opinion, is a determination of whether the district court did or did not have jurisdiction,.... The correctness of the trial court's rulings on jurisdiction is an issue to be decided in the pending appeal...." 406 F.2d at 17. In this case mandamus was sought while an appeal of the state court decision, including the jurisdictional question, was pending before the Mississippi Supreme Court. Under these circumstances we are loath to assume that the denial of the writ without opinion was a determination on the merits of the claimed jurisdictional error.

[5] Finally, it is well settled that the Supreme Court's denial of a petition for certiorari "carries with it no implication whatever regarding the Court's views on the merits of a case which it has declined to review." *Maryland v. Baltimore Radio Show, Inc..*, 338 U.S.

---

5. *See, e.g.*, Field, *The Abstention Doctrine Today*, 125 U.Pa.L.Rev. 590, 592 (1977).

912, 919, 70 S.Ct. 252, 255, 94 L.Ed. 562 (1950) (per Frankfurter, J.).

We therefore conclude that we are not bound by any law of the case on this appeal.

II. *Collateral Attack on the State Court's Jurisdiction.*

[6] We have no power to vacate the decision of the Mississippi Supreme Court, which approved the jurisdiction of the Mississippi trial court, for this court has held that "[i]t is not the province of lower federal courts to review the appropriateness of civil decisions of a state's highest court; review of that judgment properly lies by writ of certiorari to the Supreme Court of The United States." *Olivares v. Martin*, 555 F.2d 1192, 1196 (5th Cir. 1977). A review of the state court's jurisdiction, however, is one step in our analysis of whether it was proper to accord res judicata effect to that state court judgment in the stayed federal court action.

[7] A determination by a state court that is has jurisdiction of the case presented to it is generally conclusive, at least when the jurisdictional question is fully litigated. This principle derives form the full faith and credit clause of the Constitution, U.S.Const. Art. IV, § 1, and is implemented in the federal courts by 28 U.S.C. § 1738. *See Durfee v. Duke*, 375 U.S. 106,84 S.Ct. 242, 11 L.Ed.2d 186 (1963). In *Durfee* the Court stated the "general rule" that "[a] judgment is entitled to full faith and credit-even as to questions of jurisdiction-when the [second] court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment." 375 U.S. at 111, 84 S.Ct. at 245. The court in *Durfee* acknowledged, however, that this general rule of finality of jurisdictional determinations is ot without exceptions. The court then stated that "[d]octrines of federal pre-emption or sovereign immunity may in some contexts be controlling," 375 U.S. at 114, 84 S.Ct., at 246, but concluded that "no such overriding considerations", *id.*, were present in *Durfee*. In footnote 12 of the opinion in *Durfee*, the Court noted that the Restatement of Conflict of Laws recognizes the possibility of such exceptions and quoted the following rule from the Restatement:

> "Where a court has jurisdiction over the parties and determines that it has jurisdiction over the subject matter, the parties cannot collaterally attack the judgment on the ground that the court did not have jurisdiction over the subject matter, unless the policy underlying the doctrine of res judicata is outweighed by the policy against permitting the court to act beyond its jurisdiciton. Among the factors appropriate to be considered in determining that collateral attack should be permitted are that
>
> "(a) the lack of jurisdiction over the subject matter was clear;
>
> "(b) the determination as to jurisdiction depended upon a question of law rather than of fact;
>
> "(c) the court was one of limited and not of general jurisdiction;
>
> "(d) the question of jurisdiction was not actually litigated;
>
> "(e) the policy against the court's acting beyond its jurisdiction is strong." Restatement, Conflict of Laws, § 451(2) (Supp.1948). See Restatement, Judgements, § 10 (1942).

Id. at 114 n.12. 84 S.Ct. at 247 n.12.

Although the Court in *Durfee* was not presented with what it termed "overriding considerations" of federal preemption or sovereign immunity and thus did not undertake the analysis described in the Restatement, the Court's footnote 12 suggests that such an analysis would be appropriate when a federal court is presented, as we are here, with a collateral attack on a state court judgment on the ground that the state court did not have jurisdiction over the subject matter by virtue both of a species of federal preemption and of sovereign immunity.

[8] We begin that analysis, in parts A and B below, by considering the Keys' two primary challenges to the state court's jurisdiction. In part C, we apply the Restatement factors to both of the claimed grounds of jurisdictional error, and we conclude that the state court's jurisdiction is not open to collateral attack.

A. *Applicability of § 2409a to the State Court Action.*

In effect, the state ourt decided all the issues, and only the issues, that were first presented to the federal court in a case that alleged that the federal court had exlusive jurisdiction to hear it. Both actions were lawsuits to adjudicate title to the same property, and hence both actions involved the same issues of Mississippi property law, but the parties were different. In the federal action, the Keys sued the Wises *and* the United States. The

---

6. The Keys argue that there was no jurisdiction in the state court for other reasons, too. Their contentions that discovery was restricted in the state court, that the statute of limitations in § 2409a was not applied in the state court, and that the Chancellor was biased, however, are not challenges to the state court's jurisdiction, but are appropriate considerations in the decision whether to accord res judicata effect to the state court judgment in the federal action. Accordingly, we deal with those contentions in part III, *infra*.

The other argument made by the Keys does go to the state court's jurisdiction. The Keys argue that the United States was a necessary party to the state court lawsuit, and its absence there defeated the state court's jurisdiction. This contention was presented to the Chancellor and was an assignment of error to the Mississippi Supreme Court. Whether the United States was a necessary party to the state court lawsuit is a question of Mississippi law, and we accept the holding of the highest court of that state that the United States was not a necessary party to the state court lawsuit. Of course, the United States is a party in the federal action.

Keys' assertion of ownership of the land was a claim adverse to an interest claimed by the United States, because the United States had acquired its levee easement through the Wises. That claim not only provided the Keys with access to the federal court under the terms of 28 U.S.C. §§ 2409a and 1346(f), but also gave that court exclusive jurisdiction over the entire civil action and not merely over the claim against the United States. When, following the federal court's abstention, the Wises filed suit in the state court, they did not join the United States, for the United States did not claim an interest in the land adverse to them. Although the Keys sought a dismissal of the state court complaint on the ground that the United States was a necessary party to the lawsuit and had not been joined, the Chancellor apparently determined that the United States' interest in the property did not make it a necessary party under Mississippi law. The Keys also sought a dismissal in the state court on the ground that jurisdiction of the case was exclusively in federal courts. Although § 2409a applies in terms to actions to quiet title to property in which the United States claims an interest, the Chancellor evidently concluded that the action did not come within the statute, and thus that § 1346(f)'s grant of exclusive federal court jurisdiction did not apply. Although the Chancellor did not explain the basis of his ruling, in affirming the Chancellor's jurisdiction the Mississippi Supreme Court noted that "[i]n the present case there is no 'interest claimed by the United States' which is controverted by the Wises and the United States is not a party." *Key v. Wise,* 341 So.2d 1326, 1327 (Miss. 1977).

[9] The Keys argue that § 2409a applied even to the lawsuit filed by the Wises in the state court. Although the United States would not have appeared there "as a party defendant," *see* 28 U.S.C. § 409a(a), at least one district court has construed § 2409a to apply to a counterclaim for a confirmation of quiet title asserted by a defendant against the United States as plaintiff in a quiet title action. *United States v. Phillips*, 362 F.Supp. 462(D.Neb.1973). We agree that the alignment of the parties is not determinative of the question whether § 2409a applies to a particular claim.

The Keys, however, did not assert a counterclaim-or, in Mississippi parlance, a cross-bill-in the state court action. They argue convincingly in brief that they did not do so for fear that such a pleading in the state court would be construed as a waiver of their right to return to federal court at the conclusion of the state court lawsuit. The Keys have taken the position throughout the litigation that their quiet title claim against the Wises and the United States can be decided only by a federal court. The Supreme Court has said that although "a party has a right to return to the District Court, after obtaining the authoritative state court construction for which the court abstained, for a final determination of his claim," *NAACP v. Button*, 371 U.S. 415, 427, 83 S.Ct. 328, 335, 9 L.Ed.2d 405 (1963), that right can be waived if the litigant submits his entire case unreservedly to the state court following abstention. *England v. Louisiana Board of Medical Examiners*, 375 U.S. 411, 419, 84

---

[7] The reversed adversarial posture of the parties was not the coincidental outcome of a race to the state courthouse door, however. Although the district court's abstention order suggested that either party could institute the state court action, the Keys would have risked dismissal of their lawsuit had they instituted the state court action. They could not claim the property against the Wises without simultaneously claiming against the interest conveyed to the United States by the Wises. In so doing, the Keys would be stating a claim described in 28 U.S.C. § 2409a, and therefore a claim within the exclusive original jurisdiction of the federal court. Because of the rule first announced in *Lambert Run Coal Co., v. Baltimore & Ohio R. Co.*, 258 U.S. 377, 42 S.Ct. 349, 66 L.Ed. 671 (1922), that upon removal a federal court must dismiss a case that falls within its exclusive jurisdiction if the case was first instituted in, and then removed from, a state court, the Keys' hands were effectively tied by the federal court's abstention and by the possibility that the Wises might frustrate their lawsuit by seeking dismissal of a Key-filed state action by way of removal to the federal court. *See, e.g., Bradford v. United States, ex rel. Dep't of Interior*, 431 S.Supp. 88 (W.D.Okl.1977).

S.Ct. 461, 471, 11 L.Ed.2d 440 (1964). It is for this reason, the Keys assert, that they did not ask the state court to quiet title in them, but only defended against the claim of the Wises.

Because the Wises claimed the land by adverse possession against the record title of the Keys, however, a decision in the state court adverse to the Wises would also be adverse to the United States, for the United States claims its easement interest through the Wises. For the same reason, a decision in the state court in favor of the Wises would also be in favor of the United States. Whichever way the title question was resolved in the state court, therefore, the lawsuit involved an adjudication of "a disputed title to real property in which the United States claims an interest." They Keys assert that the policy of § 2409a and § 1346(f) with regard to that adjudication of title is clear: such cases should be heard exclusively in federal courts. *See California v. Arizona*, 440 U.S. 59, 66-67, 99 S.Ct. 919, 924, 59 L.Ed.2d 144 (1979).

On the other hand, in addition to § 2409a(a)'s "party defendant" language, § 2409a(d) provides that jurisdiction of a § 2409a action under § 1346(f) shall cease if, before the actual beginning of the trial, the Government "disclaims all interest in the real property or interest therein *adverse to the plaintiff*" and that disclaimer is confirmed by order of the district court. 28 U.S.C. § 2409a(d) (emphasis added). This provision suggests that if the lawsuit appeared in the federal court in the posture it assumed in the state court, it would have been dismissed for lack of jurisdiction either because the Government controverted no claim to the land by a party plaintiff or because it controverted no *affirmative* claim to the land by any party. We must bear in mind, however, the Keys' argument that they sought no affirmative relief in the state court because of the rule in *England, supra*.

[10,11] In any event, the Wises argue that since the question of the applicability of § 2409a to the state court lawsuit was presented to the state court, the state court's decision that § 2409a did not apply is now res judicata. Of course, federal courts are not bound by state court decisions on matters of federal law. *See Sola Electric Co. v. Jefferson Electric Co.*, 317 U.S. 173, 63 S.Ct. 172, 87 L.Ed. 165 (1942); *Standard Oil Co. v. Johnson*, 316 U.S. 481, 62 S.Ct. 1168, 86 L.Ed. 1611 (1942); *Tipton v. Atchison, T. & S. F. R. Co.*, 268 U.S. 141, 56 S.Ct. 715, 80 L.Ed. 1091 (1936). Because our review of the state court proceedings is collateral rather than direct, however, the question for us is not simply whether the state court could properly take jurisdiction of the lawsuit, which is the federal law question involved, but the much more circumscribed inquiry whether the state court's assumption of jurisdiction is open to colateral attack. We interpret the Supreme Court's opinion in *Durfee v. Duke*, 375 U.S. 106, 84 S. Ct. 242, 11 L.Ed.2d 186 (1963), to mean that even when the claimed jurisdictional error is predicated upon a state court construction of federal law, as it was in *Kalb v. Fuerstein*, 308 U.S. 433, 60 S.Ct. 343, 84 L.Ed. 370 (1940), the inquiry on collateral attack should still be guided by the factors listed in the Restatement, quoted above. *See Durfee v. Duke*, 371 U.S. at 114 n. 12, 84 S.Ct. at 247 n. 12.

B. *The District Court's Power to Abstain.*

The Keys also argue that even if § 2409a did not apply to the lawsuit filed in the state court, the state court was without jurisdiction to render a judgment in the case because the federal district court was powerless to abstain in the face of § 1346(f)'s express grant of exclusive jurisdiction. The Keys' brief poses this question: "May a District Judge [abstain] in a case, the jurisdiction of which is exclusively in the District Court?" Although the full implications of this question are not spelled out in the brief, we believe the question is significant.

[12,13] The state court action was filed after the district court had assumed jurisdiction of the case. Both the state court and the federal court actions were actions in rem concerning the same res. A court's otherwise valid power to take jurisdiction of an in rem action is qualified by the rule that when a court of competent jurisdiction has obtained possession, custody, or control of the disputed res in an in rem action, that possession cannot be disturbed by any other court. *See, e. g., Mandeville v. Canterbury*, 318 U.S. 47, 63 S.Ct. 472, 87 L.Ed. 605 (1943); *Toucey v. New York Life Ins. Co.*, 314 U.S. 118, 62 S.Ct. 139, 86 L.Ed. 100 (1941); *Princess Lida of Thurn & Taxis v. Thompson*, 305 U.S. 456,59 S.Ct. 275, 83 L.Ed. 285 (1939); *see generally* C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure,* § 3631 n. 15 (citing cases). The assumption of jurisdiction over an action in rem established a bar to any other action in rem or quasi in rem respecting the same property until the first court's jurisdiction is properly terminated. Moreover, "[t]he rule has been declared to be of especial importance in its application to Federal and state courts." *Farmers Loan & Trust Co., v. Lake St. Elevated R. Co.*, 177 U.S. 51, 61, 20 S.Ct. 564, 568, 44 L.Ed. 667 (1900).

8. The Mississippi Supreme Court characterized the state court lawsuit as an action to remove certain clouds on the Wises' title. *Key v. Wise*, 341 So.2d 1326, 1327 (Miss.1977). The relief sought by the Wises, the relief granted by the Chancery Court, and the relief affirmed by the Mississippi Supreme Court, however, not only cancelled the asserted clouds on the title, but also adjudicated the Wises to be the true owners of the land on a basis of adverse possession. The judgment included a decree setting out in detail the ownership interests of the various triumphant parties. The state court lawsuit thus involved a disposition of the property. Under Mississippi law, that action was in rem. *See Ravesies v. Martin*, 190 Miss. 92, 199 So. 282, 285 (1940).

In this case the federal court was the first court to assume jurisdiction of the res in dispute, thereby activating the bar of exclusive in rem jurisdiction. So long as the federal court maintained its hold on the res, the Mississippi courts could not obtain jurisdiction to act in rem with respect to that res. Ordinarily, however, nothing would prevent the federal court from terminating its hold on the res, for example by dismissal, or from transferring jurisdiction of the res to the state court, for example by abstention, *see, e. g., Colorado River Water Cons. Dist. v. United States*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976). When Congress has directed, however, not only that the federal courts may take jurisdiction of a particular class of cases, but also that they have *exclusive* jurisdiction of those cases, abstention to permit adjudication of the entire case in a state forum defeats the purpose of that legislation.

[14] Abstention in this case was clearly improper, even leaving to one side the exclusive character of the federal court's jurisdiction. The basis for the district court's abstention was that the case involved "uncertain and complex state land law issues." Although the relevant Mississippi property law may have been difficult to ascertain, it was in no sense unsettled, and the Supreme Court has said that "the mere difficulty in ascertaining local law is no excuse for remitting the parties to a state tribunal for the start of another lawsuit." *Lehman Brothers v. Schein*, 416 U.S. 386, 390, 94 S.Ct. 1741, 1744, 40 L.Ed.2d 215 (1974); *see also Meredith v. City of Winter Haven, 320 U.S. 228, 234-35, 64 S.Ct. 7, 10-11, 88 L.Ed. 9 (1943); accord, Sayers v. Forsyth Building Corp.*, 417 F.2d 65, 72-74 (5th Cir. 1969); *Howell v. Union Producing Co.*, 392 F.2d 95, 98 (5th Cir. 1968).

The question remains, however, whether the improper abstention affected the jurisdiction of the state court. If it was beyond the district court's *power* to decline to exercise the jurisdiction Congress conferred exclusively on it, then the abstention order would be invalid as a judicial act going beyond the court's jurisdiction. It would seem to follow from that proposition that the abstention, if invalid, would not operate to lift the bar of exclusive in rem jurisdiction, and consequently that the state court could not properly take jurisdiction of the case. On the other hand, if the district court had the power to abstain despite its exclusive jurisdiction, then, even if improper, the abstention was a valid judicial act.

In a recent opinion, the Supreme Court implied that the question whether a federal court has the power to decline to exercise exclusive jurisdiction, in order to permit the institution of state court proceedings to resolve the merits of the issues within that exclusive jurisdiction, is an open one. In *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 98 S.Ct. 2552, 57 L.Ed.2d 504 (1978), the Court said:

> Calvert contends that a district court is without power to stay proceedings, in deference to a contemporaneous state action, where the federal courts have exclusive jurisdiction over the issue presented. *Whether or not this is so,* petitioner has not purported to stay consideration of Calvert's claim for damages under the Securities Exchange Act of 1934, which is the *only* issue which may not be concurrently resolved by both courts.

Id. at 666, 98 S.Ct. at 2559. (footnote omitted) (first emphasis added).

C. *Application of the* Restatement *Factors.*

The legal questions on which the jurisdiction of the

Mississippi court ultimately depended in this case—whether § 2409a applied to the state court action and whether the district court had the power to abstain are both unsettled, and we express no view on how either question should be resolved. All we decide on this appeal regarding the jurisdiction of the Mississippi courts is the threshold question whether collateral attack is permissible in the federal court action.

[15] In this case, our application of the factors enumerated in the Restatement of Judgments leads us to conclude that the Mississippi courts' jurisdictional determination is conclusive. Although the Mississippi Chancery Court is a court of limited jurisdiction, the lawsuit to adjudicate title to the property at issue belongs to one of the classes of cases committed to the jurisdiction of that court by the Mississippi Constitution, Miss.Const., Art. 6, § 159. Moreover, although the determination as to jurisdiction depended upon questions of law rather than of fact, the questions of law we think were at issue are questions to which no definitive answer has been rendered. Therefore, it cannot fairly be said that the alleged lack of jurisdiction over subject matter was clear. The question of jurisdiction was actually litigated before both the Chancery Court and the Mississippi Supreme Court. These are the factors that counsel against collateral attack on the jurisdiction of the state court.

On the other hand, we think the policy against the Mississipi court acting beyond its jurisdiction in this case is strong. Congress enacted § 1346(f) knowing full well that, with minor exceptions, the law applied in every quiet title action would be the law of a state. Nevertheless, by vesting the exclusive jurisdiction of those actions brought pursuant to § 2409a in the federal courts, Congress unequivocally and, we think, emphatically, intended to withdraw resolution of those questions from the jurisdiction of all state courts. *See California v. Arizona,* 440 U.S. 59, 66—67, 99 S.Ct. 919, 924, 59 L.Ed.2d 144 (1979) ("The congressional purpose was simply to confine jurisdiction to the federal courts and to exclude the courts of the States,...").

We note that in discussing the collateral attack rule the Supreme Court has suggested that actual litigation of the jurisdictional issues in the first forum is particularly significant. *See Durfee v. Duke,* 375 U.S. 106, 114 n. 12, 84 S.Ct. 242, 247 n. 12, 11 L.Ed.2d 186 (1963). We also presume, since permissible collateral attack is the exception rather than the rule, that unless the jurisdictional error is palpable, doubts should be resolved in favor of finality. We therefore hold that the judgment of the Mississippi Court as to jurisdiction is not subject to collateral attack on this appeal.

III. *Res Judicata Effect of Valid State Court Judgment.*

Discussing the "preclusion" doctrines of res judicata and collateral estoppel in a recent case, the Supreme Court observed:

> A fundamental precept of common—law adjudication, embodied in the related doctrines of collateral estoppel and res judicata, is that a "right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction...cannot be disputed in a subsequent suit between the same parties or their privies...." *Southern Pacific R. Co. v. United States,* 168 U.S. 1, 48—49 [18 S.Ct. 18, 27, 42 L.Ed. 355] (1897)....Application of both doctrines is central to the purpose for which civil courts have been established, the conclusive resolution of disputes

> within their jurisdictions. *Southern Pacific R. Co.*, supra, at 49 [18 S.Ct. at 27]; *Hart Steel Co. v. Railroad Supply Co.*, 244 U.S. 294, 299 [37 S.Ct. 506, 507, 61 L.Ed. 1148] (1917). To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.

Montana v. United States, 440 U.S. 147, 153, 99 S.Ct. 970, 973, 59 L.Ed.2d 210 (1979) (footnote omitted). The Court went on to note, however, that "special circumstances [may] warrant an exception to the normal rules of preclusion." *Id.* at 155, 99 S.Ct. at 975. The Court noted that special circumstances were presented by a case like *England v. Louisiana Board of Medical Examiners*, 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964), in which a litigant who had "properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims" was then "compelled, without his consent..., to accept a state court's determination of these claims." 375 U.S. at 415, 84 S.Ct. at 464 (footnote omitted), *quoted in Montana*, 400 U.S. at 163, 99 S.Ct. at 978. The *England* Court gave two reasons for preserving the right to a federal adjudication of a constitutional claim. First, the Court noted that a rule that would force a federal plaintiff to repair to a state court, against his will, for a binding adjudication of a claim for which Congress has provided a federal forum "would be at war" with the constitutionally valid expression of congressional purpose—*i.e.*, the decision to open the doors of the federal courthouse—and with the principle that federal courts should give full effect to Congress' jurisdictional commands. 375 U.S. at 415, 84 S.Ct. at 464.

Second, the Court observed that limited federal review of the state court adjudication, consisting of direct review in the Supreme Court by way of certiorari or appeal,

> is an inadequate substitute for initial District Court determination—...to which the litigant is entitled in the federal courts. This is true as to issues of law; it is especially true as to issues of fact. Limiting the litigant to review here would deny him the benefit of a federal trial court's role in constructing a record and making fact findings. How the facts are found will often dictate the decision of federal claims. "It is the typical, not the rare, case in which constitutional claims turn upon the resolution of contested factual issues." *Townsend v. Sain,* 372 U.S. 293 [83 S.Ct. 745, 9 L.Ed.2d 770]. "There is always in litigation a margin of error, representing error in factfinding* *." *Speiser v. Randall,* 357 U.S. 513 [78 S.Ct. 1332, 2 L.Ed.2d 1460]. Thus in cases where, but for the application of the abstention doctrine, the primary fact determination would have been by the District Court, a litigant may not be unwillingly deprived of that determination. The possibility of appellate review by this Court of a state court determination may not be substituted, against a party's wishes, for his right to litigate his federal claims fully in the federal courts.

375 U.S. at 416—17, 84 S.Ct. at 465 (footnote omitted).

England involved a constitutional claim, as to which federal jurisdiction is original. Although this case involves a claim under state law, jurisdiction to decide it is exclusively federal. Even though we have held that the state court judgment is not open to collateral attack, the preclusive effect of a state court determination on any aspect of a claim within the exclusive jurisdiction of the federal courts is unclear. *See, e.g.,* Note, *Res Judicata:*

Exclusive Federal Jurisdiction and the Effect of Prior State—Court Determinations, 53 Va.L.Rev. 1360 (1967). In *Will v. Calvert Fire Insurance co.,* 437 U.S. 655, 98 S.Ct. 2552, 57 L.Ed.2d 504 (1978), Justice Brennan, writing for the dissent, discussed the question in the following terms.

> To be sure, the preclusive effect of a state court determination of a claim within the exclusive jurisdiction of the federal courts is an unresolved and difficult issue. See generally Note, Res Judicata: Exclusive Federal Jurisdiction and the Effect of Prior State—Court Determinations, 53 Va.L.Rev. 1360 (1967). For myself, I confess to serious doubt that it is ever appropriate to accord res judicata effect to a state—court determination of a claim over which the federal courts have exclusive jurisdiction; for surely state—court determinations should not disable federal courts from ruling de novo on purely legal questions surrounding such federal claims. See *Cotler v. Inter—County Orthopaedic Assn.,* 526 F.2d 537 (CA3 1975); *McGough v. First Arlington National Bank,* 519 F.2d 552 (CA7 1975); *Clark v. Watchie,* 513 F.2d 994 (CA9 1975). As recognized by Judge Learned Hand in *Lyons v. Westinghouse Electric Co.,* 222 F.2d 184, 189 (CA2 1955), "the grant to the district courts of exclusive jurisdiction over the action...should be taken to imply an immunity of their decisions from any prejudgment elsewhere." I recognize that it may make sense, for reasons of fairness and judicial economy, to give collateral—estoppel effect to specific findings of historical facts by a state court's adjudicating an exclusively federal claim raised as a defense, see *Granader v. Public Bank,* 417 F.2d 75 (CA6 1969), but there are reasons why even such a limited preclusive effect should not be given state—court

> determinations. It is at least arguable that in creating and defining a particular federal claim, Congress assumed that the claim would be litigated only in the context of federal—court procedure—a fair assumption when the claim is within exclusive federal jurisdiction. For example, Congress may have thought the liberal federal discovery procedures crucial to the proper determination of the factual disputes underlying the federal claim.

437 U.S. 674—75, 98 S.Ct. 2563 (Brennan, J., dissenting).

The Supreme Court recently declined to give res judicata effect to a state court judgment in a later bankruptcy proceeding in federal court. At issue in *Brown v. Felsen*, 442 U.S. 127, 99 S.Ct. 2205, 60 L.Ed.2d 767 (1979), was the question whether a bankruptcy court could go beyond the judgment and record of a prior state court proceeding (in which Felsen's debt to Brown was reduced to judgment) in determining whether Felsen's debt was dischargeable in bankruptcy. The parties had stipulated to judgment in the Colorado state court proceeding. Under the provisions of § 17 of the Bankruptcy Act, 11 U.S.C.A. § 35, Felsen's debt was not dischargeable if, as Brown sought to show in the bankruptcy proceeding, it was (1) a liability "for obtaining money or property by false pretenses or false representations...or for willful and malicious conversion of the property of another", or (2) a debt "created by [the bankrupt's] fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity." *See* Bankruptcy Act, 11 U.S.C.A. § 35 (repealed effective Oct. 1, 1979, Bankruptcy Reform Act of 1978, Pub.L. 95—598, § 401(a), 92 Stat. 2682). Before 1970, once a debtor was adjudged a bankrupt in a bankruptcy proceeding, determinations of dischargeability under the Bankruptcy Act were left to the state court in which a creditor sued to enforce his prior judgment. "In 1970, however, Congress altered § 17 to require creditors to apply to the bankruptcy court for adjudication of certain dischargeability questions, including those arising under" the provisions quoted above, 99 S.Ct. at 2208.

Under Colorado law, however, Brown could have obtained extraordinary remedies, such as exemplary damages or body execution (imprisonment of the debtor at the creditor's expense), by seeking an adjudication, in the prior state court proceeding, that Felsen's debt was the product of his fraud. Felsen argued that the provisions of § 17 relied on by Brown essentially concerned fraud, and that since Brown did not obtain a stipulation concerning fraud in the prior state court proceeding, Brown should be precluded from litigating the question in the bankruptcy court because it was a matter that could have been concluded in the consent judgment. 99 s.Ct. at 2209.

[16] Once a lawsuit reaches a final judgment on the merits, the doctrine of res judicata bars litigation in a second lawsuit on the same cause of action "of all grounds for, or defenses to, recovery that were available to the parties [in the first action], regardless of whether they were asserted or determined in the prior proceeding." *Id.* Res judicata thus generally has a broader preclusive effect than the doctrine of collateral estoppel, which "treats as final only those questions *actually and necessarily* decided in a prior suit." *Id.* at 2213, n.10 (emphasis added). *Brown v. Felsen* considered only the questions whether the doctrine of res judicata barred litigation of the dischargeability question in the bankruptcy court; it did not consider the possible application of collateral estoppel because Felsen did not argue that the state court litigation had "actually and necessarily decided either fraud or any other question

against [Brown]." The Court held that res judicata would not bar litigation of the dischargeability question in the bankruptcy court because "neither the interests served by res judicata, the process of orderly adjudication in state courts, nor the policies of the Bankruptcy Act would be well served" by precluding litigation of the issue. *Id.* at 2210.

The Court noted that the Bankruptcy Act was intended to protect the honest debtor, while the doctrine of res judicata shields the honest and dishonest alike. The Court characterized Felsen's bankruptcy petition as a "new defense," albeit an indirect one, to the indebtedness established in the state court proceeding. Since Brown's challenge to dischargeability did not seek to avoid the state court decree, but was instead *predicated* on the debt established in that proceeding, the Court characterized *Felsen* as the party seeking—by his bankruptcy petition—to upset the repose of a final state court judgment. The Court suggested that the interest furthered by res judicata—by which it apparently meant "confidence in judgments"—would not be promoted by using the doctrine to prevent Brown from establishing that the debt could not be discharged in bankruptcy.

Orderly adjudication in the state courts would not be promoted by the application of res judicata either, the Court continued, because the fraud/extraordinary remedies issue would not usually be raised in the state court proceeding. Presumably, Brown wanted to establish his right to payment by Felsen in the state court, which he did. The Court considered that Brown had little or no incentive to take the litigation further because (1) Felsen's bankruptcy petition was not on the horizon, so Brown had no reason to apprehend that establishing fraud was a necessary milepost on the road to payment; and (2) the extraordinary remedies available under Colorado law theoretically *reduced* the ly have to shoulder. That is, since the Court assumed that the issue of dischargeability or a similar state law question would not normally be litigated in the state court collection proceeding, res judicata would in this kind of case occasion *more* interference with state court adjudication by encouraging litigation of issues the state court would not normally encounter and with which the state court would be unfamiliar.

Finally, the Court said that the federal statutory policy was to permit bankruptcy courts to make an accurate determination regarding dischargeability. The Bankruptcy Act was not intended to shield debtors from liability for debts "growing out of offenses to good morals," *id.* at 2212-13 (*quoting* H.R.Rep. No. 1698, 57th Cong., 1st Sess., p. 6 (1902), a policy the Court considered fundamental to the statute. Applying the doctrine of res judicata would prevent the bankruptcy court from resolving a question of federal law, *i.e.*, dischargeability, that was central to the proper application of the federal statute.

Of the three factors the *Brown* Court said militated against applying res judicata in that case—the interest served by res judicata, the orderly process of adjudication in state courts, and the policies of the federal statute involved—only the last provides an arguable basis for denying res judicata effect to the state court judgment in this case. The interests served by res judicata, such as fostering confidence in judgments, conserving judicial resources, and saving prevailing parties the expense and vexation of multiple litigation, *see Montana v. United States*, 440 U.S. at 153, 00 S.Ct. at 973, are promoted by the application of the doctrine to this case. Unlike the situation in *Brown v. Felsen*, in this case the doctrine is not invoked in a effort to shield the losing party from the consequences of what was actually decided in the first litigation; instead, its application is likelihood that the debt itself would be paid: exemplary damages might trigger bankruptcy and therefore impair Felsen's ability to pay the debt, and body execution could disable the debtor from earning the funds to pay the debt. In the "ordinary collection proceeding," then, "considerations material to discharge are irrelevant." *Id.* at 2211. Additionally, since one purpose of Congress' decision to eliminate "post—bankruptcy state—court collections suits as a means of resolving certain...dischargeability questions" was to permit bankruptcy courts to develop expertise in handling them, a rule that would force a creditor to litigate the dischargeability issue, or a similar state law issue, in the state court merely to protect himself in the event of a later bankruptcy petition by the debtor would force the state courts to assume a burden they would ot normal- invoked to prevent *re*litigation of the issues actually decided. Furthermore, application of the doctrine in this case will not affect the orderly process of the state court adjudication. Although it is true that this specific case ought not to have reached the state court by way of abstention, a rule prohititing relitigation of the issues actually determined there will not force state courts to adjudicate claims they would not otherwise hear. Of the factors considered by the *Brown* Court, then, only the question of the federal statutory policy informing Congress' grant of exclusive jurisdiction to federal courts over § 2409a actions remains to be considered.

This case presents an unusual instance of exclusive federal jurisdiction, in that it provides federal courts with exclusive jurisdiction to decide questions of state law. Most other instances of exclusive federal jurisdiction concern controversies whose resolution will or-

---

9. Federal law, however, governs some aspects of a quiet title action brought pursuant to § 2409a. Specifically, the point at which a § 2409a cause of action accrues, and the time within which the action must be brought after accrual, are established in 28 U.S.C. § 2409a(f). Neither provision would have affected this lawsuit.

dinarily be governed by the application of federal law. *See generally* C. Wright & A. Miller, 13 *Federal Practice and Procedure*, § 3527, pp. 121-22 (1975); *but see* 28 U.S.C. § 1351 (actions against consuls and vice consuls in exclusive jurisdiction of federal courts). Some of the reasons advanced for denying res judicata effect to state court determinations of matters within the exclusive jurisdiction of the federal courts have little force in the context of this case because little federal law is involved. For example, the federal courts' experience in adjudicating federal claims, and the general interest in

---

[10] A reading of the Chancellor's formal findings does not elucidate the basis of his decision. The full extend of the Chancellor's findings of fact and conclusion of law on the central question of adverse possession by the Wises is contained in the following excerpt from the Chancellor's memorandum opinion:

> Ifind as a fact that the parties complainant, through and by their predecessors in title, entered said lands in controversy with good and sufficient color of title and have there remained from the year 1932, thence hitherto, which occupancy has been and is hostile, actual, open, notorious, and exclusive to all others.
>
> I find as a fact that none of the several other defenses raised by the answer; outright fraud, concealed fraud, fiduciary relationship, including but not limited to the charging of "excessive, illegal and usurious interest", can prevail to toll the statute. This Court here makes this above disposition of these issues in the height of charity.
>
> I find as a fact that the last issue involved herein as going to the merits, to-wit, the effect of the mortgage of February 5, 1931, given by only Carrie Cook Key, Roscoe Key, and Thomas Key, must be resolved against the defendants for the reasons that the entry above, constitutes a sufficient ouster of Georgia Key Bolden, Alfred Key Herman and Carrie Key Johnson, and their successors, notwithstanding the erroneous conclusion of law pled by defendants concerning the effect of said deed of trust and the quantum of interest therein conveyed.
>
> In short, I find as a fact that complainants have prevailed by that necessary degree of the credible evidence in the establishment of the allegations of their original bill.

From the Chancellor's opinion it is not clear what acts constituted entry on the property under color of title in 1932. The evidence is uncontroverted that none but the Keys lived on the property until 1970. The Chancellor apparently concluded, however, that although Tom Key's occupancy of the property was undisturbed until the end of the 1969 crop year, in 1932 he became a tenant on the property and attorned thereafter to the Wise Brothers.

There is evidence in the record that supports the conclusion that in the two or three decades preceding the filing of the Key's federal lawsuit in 1972, Tom Key considered himself a tenant of the Wise Brothers.

What is not clear from the opinion or the record is how the Wises acquired colof this controversy, because the controversy is governed by state, not federal, substantive law.

A greater familiarity with, and expertise in the application of, federal law is not the only difference between a federal and a state forum. Specific fact findings and legal conclusions are required of federal trial

or of title in 1932. The Mississippi Supreme Court's opinion, *Key v. Wise*, 341 So.2d 1326, 1327 (Miss.1977), suggested that this case involved issues "substantially similar" to those involved in *Nichols v. Gaddis & McLaurin, Inc.*, 222 Miss. 207, 75 So.2d 625, 78 So.2d 471 (1954), and that evidence justified a factual conclusion that the elements of adverse possession under color of title enumerated in *Quates v. Griffin*, 239 So.2d 803 (Miss.1970), were satisfied. Having read both cases, as well as the cases upon which those cases in turn rely, we still cannot tell what the Chancellor believed happened in 1932. Neither the Mississippi Supreme Court's opinion nor than that of the Chancellor make or refer to any findings of specific historical facts. Moreover, although the Mississippi Supreme Court cites two cases, the Chancellor's cites none; and the two citations in the Mississippi Supreme Court's opinion are of little help in determining what law was applied in concluding that the Wises had obtained title by adverse possession under color of title. To borrow a phrase from one of Britain's famous statesmen, the decision in this case remains very much "an enigma cloaked in mystery." The ultimate ruling, however, is clear: the property belongs to the Wises.

11. A different result would probably obtain if the state court's ultimate legal conclusion required it to construe and apply federal law that formed the basis of an exclusively federal claim. In such a case, the inability of the federal court to distinguish the state court's underlying factual findings and legal conclusions from its overall disposition of the case might be a reason to deny the state court judgment preclusive effect in the federal action.

In *Lyons v. Westinghouse Elec. Corp.*, 222 F.2d 184 (2d Cir.), *cert. denied*, 350 U.S. 825, 76 S.Ct. 52, 100 L.Ed. 737 (1955), Judge Learned Hand suggested that when a state court judgment is urged as a bar in a later federal action on an exclusively federal claim, the proper rule is that res judicata applied to the state court findings "of the constituent facts that together make up a claim," but not to the state court's ultimate resolution of the claim based upon those facts. *Id.* at 188. Similarly, Justice Brennan's dissent in *Will v. Calvert Fire Ins. Co.*, 437, U.S. 655, 98 S.Ct. 2552, 57 L.Ed.2d 504 (1978), suggests that although "it may make sense, for reasons of fairness and judicial economy, to give collateral-estoppel effect to specific findings of historical facts by a [state court]," nevertheless, the "state court determination should not disable federal courts from ruling de novo on purely legal questions surrounding...federal claims." *Id.* at 674-75, 98 S.Ct. at 2564. *See also Brown v. Felsen*, 99 S.Ct. 2205, 2213, n.10 ("If, in the course of adjudicating a state-law question, a state court should determine factual issues using standards identical to those of [the relevant Federal law], then collateral estoppel, *in the absence of* countervailing statutory policy, would bar relitigation of those issues in the bankruptcy court.").

Both *Lyons* and *Will* involved exclusive federal jurisdiction to adjudicate federal questions. In such cases there is an interest in preserving "an untrammelcourts, and are essential to meaningful review by an appellate court. *See, e. g., Complaint of Ithaca Corp.*, 582 F.2d 3, 4 (5th Cir. 1978). The findings and conclusions of the state trial court in this case wouldnot pass muster in the federal system. Since we are not called upon to uniform and effective application of federal law, *see Lyons v. Westinghouse Elec. Corp.*, 222 F.2d 184, 189 (2d Cir.), *cert. denied,* 350 U.S. 825, 76 S.Ct. 52, 100 L.Ed. 737 (1955), are not reasons to insist on relitigation review the findings of the state court on the merits, however, the absence of an opinion setting out clearly the historical facts found and the law relied upon presents no great problem when the ultimate legal conclusion—that the land belongs to the Wises—is clear, and is a conclusion based entirely on state law.

Another difference between a federal forum and a state forum is that federal discovery rules are generally more liberal than are their state counterparts. This difference may be particularly significant in the context of a § 2409a claim, because disputes about title generally turn more on factual questions than on legal ones; the court's attention will usually focus more on determining who did what, and when, than on nice questions of the legal significance of those events. In this context, Justice Brennan's observation in *Calvert* that, in conferring exclusive jurisdiction on the federal courts, Congress may have assumed that the claim would have been litigated only in the context of federal court procedures is particularly relevant. Where, as here, the ultimate resolution of the controversy depends primarily on the court's

ed jurisdiction of the federal courts," 222 F.2d at 189, to adjudicate questions of federal law that is not present in this case. Specifically, federal courts are not more experienced than Mississippi courts in deciding questions of Mississippi property law; and there is no occasion here for the uniform application of any federal law. To the contrary, state courts are better equipped to resolve this kind of controversy. While that is emphatically not a permissible ground for abstention in a case like this, it is a factor to be considered in deciding whether, once the state court has entered a valid judgment, the judgment should be res judicata in the federal action.

fact-finding function, an allegation that a party's proof has been impeded by discovery rules less liberal than those available in the federal system must be considered very carefully. Given the adversarial nature of our judicial process, the reliability of a court's factual determinations is obviously dependent upon all parties' access to all the extant relevant information. We think it would be unwise in a case of this nature to accord res judicata effect to a state court judgement when restrictions on discovery cast into significant doubt the reliability of the state court's factual determinations. We note, however, that at an earlier stage in this case the Keys moved to have the federal court decide the case on the record adduced in the state court. While we do not consider that motion to have waived any of their rights, we think it suggests that the Keys considered that the necessary underlying facts were adequately adduced in the state court proceeding, and that their quarrel is with the state court's resolution of the factual and legal issues put in dispute by that evidence.

Giving the state court judgment res judicata effect in this case deprives the Keys of their chosen forum and compels them, without their consent, to accept the state court's determination of their claim. *Montana v. U.S., supra,* characterized that possibility as a "special circumstance" warranting an exception to the normal rules of preclusion *when a constitutional claim is involved.* Since a claim under § 2409a, although in the exclusive jurisdiction of the federal courts, presents neither a constitutional nor a federal law issue, the question is simply whether preserving the Keys' access to a federal adjudication of their § 2409a claim is a consideration substantial enough to warrant an exception to the normal rules of preclusion.

[17-21] In *California v. Arizona,* 440 U.S. 59, 99 S.Ct. 919, 59 L.Ed.2d 144 (1979), the Court noted that the legislative history of 28 U.S.C. § 1346(f) does not illuminate much about Congress' intent in enacting it. The Court concluded that the section's purpose was simply to insure that suits brought against the United States to quiet title to land were heard in a federal court. 440 U.S. at 66-67, 99 S.Ct. at 924. Since § 2409a(d) provides that jurisdiction under § 1346(f) shall cease if the Government disclaims any interest in the property adverse to the plaintiff, it is evident that federal jurisdiction was not provided for the benefit of the private parties to suits to quiet title to land in which the Government claims an interest, but was rather intended to implement a conditional waiver of the Government's sovereign immunity: "Sue me, but sue me in my own courts." *See DuCharme v. Merrill-National Labs.*, 574 F.2d 1307 (5th Cir.), *cert. denied*, 439 U.S. 1002, 99 S.Ct. 612, 58 L.Ed.2d 677 (1978) (affirming on basis of district court opinion) ("When the sovereign waives immunity it may attach any conditions...to its consent").

11. The Government's position on this appeal warrants only brief comment. The Government filed a brief as an Appellee, limiting its argument to the contention that jurisdiction of the Key's federal action could not be predicated on 28 U.S.C. § 2409a. The Government's position is that, as far as the claim against the United States is concerned, the Keys' lawsuit is one seeking compensation for land taken by the United States. As such, the Government contends, the lawsuit was one that could have brought under the Tucker Act, 28 U.S.C. § 1346(a)(2) or 28 U.S.C. § 1491, although the six-year Tucker Act statute of limitations had run on those claims by the time the federal action was commenced. Since § 2409a provides that "[t]his section does not...aply to or affect actions which may or could have been brought under sections 1346...[or] 1491...of this title", the Government suggests that the United States should have been dismissed as a party even before the abstention order was entered, on the ground that the Keys' lawsuit was one that could have been brought under the Tucker Act had the statute not run.

The Government patently misconceives the purpose of § 2409a. The Tucker Act does not provide authority for a district court or the Court of Claims to quiet title to land, which is the relief sought in the instant case; section 2409a does. Moreover, § 2409a(b) provides a Tucker Act-type remedy (compensation) for a prevailing landowner in a § 2409a lawsuit. Finally, § 1346 contains a specific jurisdictional reference to § 2409a. All this suggests that Congress was aware that in § 2409a it was creating a specific quiet title remedy in the federal courts. We think it is obvious that § 2409a was the proper statute under which to bring this lawsuit.

In all likelihood, Congress was not sanguine about leaving resolution of title disputes between the Government and a citizen of a state to the citizen's state court. In this case, of course, the Government has not objected to the res judicata dismissal of the Keys' federal action. Given what we perceive to be the purpose of the grant of exclusive jurisdiction of § 2409a suits to the federal courts, we conclude that denying the Keys the benefit of that statutory provision in this case is not a special circumstance that warrants an exception to the normal rules of res judicata.

Accordingly, we hold that the federal action was properly dismissed on the basis of res judicata.

AFFIRMED.

JOHN R. BROWN, Circuit Judge, dissenting:

Paraphrasing the famous quip of Judge Henry Friendly the extended and scholarly opinion of Judge Randall must be right because it is so wrong. *Gulf Oil Corp. v. Panama Canal Corp.*, 407 F.2d 24, 26 (5th Cir.

---

13. While the motion to dismiss on the ground of res judicata was pending, the Keys filed an affidavit in the district court alleging that the Chancellor was biased because one of the attorneys appearing as counsel for the Wises in the Chancery Court was also an attorney for a bank from which the Chancellor rendered his opinion in the case and that no legal action to collect the debt was ever contemplated by the bank.

"Redetermination of issues is warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation." *Montana v. United States*, 440 U.S. 147, 164 n.11, 99 S.Ct. 970, 979 n.11,59 L.Ed.2d 440 (1978). Whether the affidavit of prejudice casts doubt on the fairness of the state court procedures such that redetermination of the issues in the federal court is appropriate is a question to be judged by federal law standards. Laying aside the question whether this affidavit was timely (it was filed four years after the state court trial), *see* 28 U.S.C. § 144, we think the affidavit does not "give fair support to the charge of a bent of mind that may [have] prevent[ed] or impede[d] impartiality of judgement." *Berger v. United States*, 255 U.S. 22, 33-34, 41 S.Ct. 230, 233, 65 L.Ed. 481 (1921). Therefore, we think the allegation of bias does not warrant relitigation of the issues in this case.

1. "The compulsion felt by my brothers * * to reach what seems a palpably unjust result reminds me of Chief Justice Erle's observation as to the occasional predelection of the best of judges for 'a strong decision,' to wit, one 'opposed to common sense and to common convenience.' * * *." *Spanos v. Skouras Theatres Corp.*, 2 Cir., 1966, 364 F.2d 161, 167.

1969); *Sands v. Wainwright,* 491 F.2d 417, 431 (en blanc) (Chief Judge Brown concurring); *W. S. Rauch Co. v. Kaiser Steel Corp.,* 388 F.2d 257, 267 10th Cir. 1967) (Brown, J. dissenting) rev'd 391 U.S. 593, 88 S.Ct. 1753, 20 L.Ed.2d 762, 775 (Chief Judge Brown, dissenting) (1976). Of it may also be said what we stated concerning Judge Sterry Waterman's opinion for us in *United States v. Rochelle, Trustee,* 363 F.2d 225 (5th Cir. 1966). A "painstaking opinion by Judge Waterman-painstaking not only in the careful exploration of every conceivable way to find juridiction, but also painstaking in the evident sense of trying to find an escape from a painfully unfortunate result...." *Lawrence v. United States,* 378 F.2d 452, 467 (5th Cir. 1967).

For my scripture I start with § 1346(f):

> The district courts shall have exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States.

28 U.S.C.A. § 1346(f).

And for my Golden Text I need go no further than the Court's opinion:

> In the federal action, the Keys sued the Wises *and* the United States. The Keys' assertion of ownership of the land was a claim adverse to an interest claimed by the United States had acquired its levee easement throught the Wises. That claim not only provided the Keys with access to the Federal court under the terms of 28 S.C.A.§§ 2409a and 1346(f), but also gave that court exclusive jurisdiction over the entire civil action and not merely over the claim against the United States. [Slip op. 828, F.2d ,].

First analyzing the case in terms of traditional abstention in *in rem* proceedings the Court states:

> Both the state court and the federal court actions were actions in rem concerning the same res. A court's otherwise valid power to take jurisdiction of an in rem action is qualified by the rule that when a court of competent jurisdiction has obtained possession, custody, or control of the disputed res in an in rem action, that possession cannot be disturbed by any other court.

And then adds:

> Moreover, "[t]he rule has been declared to be of especial importance in its application to Federal and state courts." *Farmers Loan & Trust Co. v. Lake St. Elevated R. Co.*, 177 U.S. 51, 61 [20 S.Ct. 564, 568, 44 L.Ed. 667] (1900). [Slip op. 830, F.2d].

The court recognizes that in "this case the federal court was the first court to assume jurisdiction of the res in dispute, thereby activating the var of exclusive in rem jurisdiction." [Slip op. 830, F.2d].

The court sounds once again the decisive significance of specific congressional direction:

> When Congress had directed, however, not only that the federal courts may take jurisdiction of a particular class of cases, but also that they have *exclusive* jurisdiction of those cases, abstention to permit adjudication of the entire case in a state forum defeats the purpose of that legislation. [Slip op. 831, F.2d].

Without equivocation the court then reaches the awesome climax: "[A]bstention in this case was clearly improper..." [Slip op 831, F.2d].

The court in the analytical juggling process-sometimes, perhaps too often, more euphemistically described as balancing-begins with whether the Federal

---

2. The court reiterates this "....it is true that this specific case ought not to have rached the state court by way of abstention..." [Slip op. 836, F.2d]

Court may collaterally review the Mississippi decree of ownership in the Wises. In so doing the Court again ascribes dominant significance to Federal Court exclusivity and the congressional purpose in providing for it:

> we think the policy against the Mississippi court acting beyond its jurisdiction in this case is strong. Congress enacted § 1346(f) knowing full well that, with minor exceptions, the law applied in every quiet title action would be the law of a state. Nevertheless, by vesting the exclusive jurisdiction of those actions brought pursuant to § 2409a in the federal courts, Congress unequivocally and, we think emphatically, intended to withdraw resolution of those questions from the jurisdiction of all state courts. See *California v. Arizona* 440 U.S. 59, 66-67 [99 S.Ct. 919, 924, 59 L.Ed.2d 144] (1979) ("the congressional purpose was simply to confine jurisdiction to the federal courts and to exclude the courts of the States,...." [Slip op.832, F.2d].

Whether the Mississippi decree may or may not be collaterally reviewed by the Federal District Court is in itself not decisive. What, and all that ultimately matters is whether preclusive effect must be given to a Mississippi decree from a Court that ought never have been given the opportunity to adjudicate the case by a Federal Court charged with the statutory obligation to hear, try and determine the controversy to the *exclusion of all other tribunals.*

The Court recognizes, as we all must, that to the high principles of res judicata/collateral estoppel "special circumstances [may] warrant an exception to the normal rules of preclusion." Montana v. United States, 440 U.S. 147, 153, 155, 99 S.Ct. 970, 973,975,59 L.Ed.2d 210 (1979).

Except that the Federal Court's jurisdiction was invoked by express terms of a statute, not a constitutional claim, our case fits exactly *England v. Louisiana Board of Medical Examiners,* 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964); in which, the majority states, a litigant who had "properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims" was then "compelled, without his consent ..., to accept a state court's determination of these claims." 375 U.S. at 415, 84 S.Ct. at 464, (footnote omitted) quoted in *Monntana,* 440 U.S. at 163, 99 S.Ct. at 978. Quoting at length from *England,* the majority emphasizes the limited effectiveness of appellate corrective action and the high value of fact determination by the Federal Judge. As to this the majority recognizes that "specific fact findings and legal conclusions are required of federal trial courts, and are essential to meaningful review by an appellate court. *See, e.g., Complaint of Ithaca Corp.,* 582 F.2d 3, 4 (5th Cir. 1978)". [Slip op 837, F.2d], but then passes over lightly that the "findings and conclusions of the state trial court in this case would not pass muster in the federal system." [Slip op 837, F.2d].

The fact that the Keys at one stage may have suggested that the Federal Court determine the case on the Mississippi trial record is not, as the court properly states, a waiver of the claim to a right of full federal pretrial discovery and evidentiary submission. But by our ruling the keys lost much more than that. They lost the invaluable right to compel Judge Keady to determine, not only historical facts but the factual/legal significance of these facts without being hog-tied by the fact findings of Mississippi Courts which we now mandate.

---

[3] The uncertainties and unknowns are highlighted in the court's note 10 which aptly describes what we now hold to be binding and beyond even superficial review as "an enigma cloaked in a mystery".

We must forget, as the court itself says, "[A]lthough this case involved a claim under state law, jurisdiction to decide it is exclusively federal". [Slip op. 833, F.2d ,].

The right to a full Federal trial-free of any inhibitions or external restraints, with an appeal to this Court-compels acceptance-as *England* forbids-of a "state court determination, against a party's wishes, for his right to litigate his federal claims fully in the federal courts." 375 U.S. at 416-17, 84 S.Ct. at 466.

The Court adds to the riddle of the enigma wrapped in a mystery. It first stated:

> The legal questions...in this case-whether § 24509a applied to the state court action and whether the district court had the power to abstain-are both unsettled, and we express no view on how either question should be resolved. [Slip op. , F.2d 830,].

It posed the alternatives in this fashion:

> If it was beyond the district court's *power* to decline to exercise the jurisdiction Congress conferred exclusively on it, then the abstention order would be invalid as a judicial act going beyond the court's jurisdiction. It would seem to follow from that proposition that the abstention, if invalid, would not operate to lift the bar of exclusive in rem jurisdiction, and consequently that the state court could not properly take jurisdiction of the case. On the other hand, if the district court had the power to abstain despite its exclusive jurisdiction, then,

---

4. The court states:

> Even though we have held that the state court judgement is not open to collateral attack, the preclusive effect of a state court determination on any aspect of a claim within the exclusive jurisdiction of the federal courts is unclear. *See e.g.*, Note, *Res Judicata: Exclusive Federal Jurisdiction and the Effect of Prior State—Court Determinations*, 53 Va.L.Rev. 1360. [Slip op. 833, F.2d]

even if improper, the abstention was a valid judicial act. (emphasis in original) [Slip op. 831, F.2d ,].

It seems to me the Court necessarily answers the unanswered, reserved query when it holds "...that the judgement of the Mississippi Court as to jurisdiction is not subject to collateral attack on this appeal." [Slip op. 832, F.2d].

And, unless the Court now means to make clear what it acknowledges is unclear its action as to preclusion adds to the confusion. Since *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 666 98 S.Ct. 2552, 2559, 57 L.Ed.2d 504 (1978) expressly avoided the question whether a federal court "is without power to stay proceedings, in deference to a contemporaneous state action, where the federal courts have exclusive jurisdiction over the issue presented," *id.* at 666, 98 S.Ct. at 2565, I think the views of Mr. Justice Brennan (quoted extensively slip op. at 834, F.2d) should guide us here until the Supreme Court authoritatively answers the question.

One last comment. Our decision not only took away the Keys right to a trial in the Federal Court. In effect it takes away their right to a trial of *their* claim against the Wises-not just their right to defend the Wises' clear title claim-in any tribunal.

* * * * * *

The clear congressional policy of §§ 2409a and 1346 (f) was to require Federal Court determination

---

5. This predicament is fully discussed by the Court [Slip op. 828, F.2d ,] and note 7: A State Court claim against the Wises (necessarily involving the United States easement) would trigger a removal to the Federal Court and an automatic dismissal for lack of State Court jurisdiction.

of any state-law based claim drawing in question continued ownership of the United States. That was the precise basis of the Keys claim. The validity of the Key's claim ousting the United States could not be determined except by trial-which Congress ordained was to take place *exclusively* in the Federal Court.

Suppose the Mississippi Courts had ruled against the Wises. Does anyone think for a moment that the Federal Court would have been precluded, at least as to the Keys, by res judicata or, more likely, collateral estoppel? This would mean a second and superfluous trial where a single one would do.

Certainly Congressional policy ought not to be flouted by the sheer circumstance of how the case comes out. Exclusivity should be applied with an even hand.

I therefore respectfully dissent.

IN THE UNITED STATES COURT OF APPEALS

U.S. FIFTH CIRCUIT COURT OF APPEALS

Unit A

No. 77-2986

Filed: May 1, 1981

U.S. COURT OF APPEALS
FILED
MAY 1 1981
GILBERT F. GANUCHEAU
CLERK

ALF KEY, et al,

Plaintiffs-Appellants,

versus

MRS. LOUISE P. WISE, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Mississippi

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion November 5, 1980, 5 Cir., 1980, 629 F.2d 1049)
(May 1, 1981)

Before BROWN, HILL and RANDALL, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is also DENIED.

ENTERED FOR THE COURT:

Carolyn Dineen Randall

CERTIFICATE OF SERVICE

I, the undersigned, C. M. Murphy, attorney for petitioners in the foregoing action, hereby certify that on the 18th day of July 1981, I served three copies of the attached Petition for Certiorari upon the defendants addressed to Vardaman S. Dunn, attorney for Wise, at his office, 1741 Deposit Guaranty Bank Building, Jackson, Mississippi 39205; and upon Nancy B. Firestone, Assistant United States Attorney, at her office at the Department of Justice, Washington, D.C. 20530.

C. M. Murphy

C. M. Murphy
Attorney for Key Petitioners
524 Melody Lane
Memphis, Tennessee 38119

Opposition

Office-Supreme Court, U.S.
FILED
AUG 13 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-187

Supreme Court of the United States

October Term, 1981

ALF KEY, ET AL.,
Petitioners,

vs.

MRS. LOUIS P. WISE, ET AL.,
Respondents.

BRIEF FOR INDIVIDUAL RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

VARDAMAN S. DUNN
Counsel of Record for Individual Respondents
Post Office Box 1046
Jackson, Mississippi 39205
Telephone (601) 354-3783

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

INDEX

CORRECTION OF INACCURACY AND OMISSION IN THE STATEMENT OF QUESTIONS PRESENTED FOR REVIEW 1

STATEMENT OF THE CASE 2

SUMMARY OF THE ARGUMENT 7

ARGUMENT:

POINT I. Abatement or "Abstention" Is Not a Viable Issue 9

POINT II. The Case Was Fully and Fairly Tried on All Issues 10

POINT III. The State Court Correctly Decided That It Had Jurisdiction in Fact 10

POINT IV.* The Judgment of the State Court Is Res Judicata and Entitled to Full Faith and Credit 15

CONCLUSION 18

TABLE OF CASES

American Surety Co. v. Baldwin, 287 U.S. 156, 53 S.Ct. 98 (1932) 16

Angel v. Bullington, 330 U.S. 183, 67 S.Ct. 657 (1947) 18

Calcote v. Wise, 68 So.2d 477 (Miss. 1953) 12

California v. Arizona, 99 S.Ct. 919 (1979) 13

Durfee v. Duke, 375 U.S. 106, 84 S.Ct. 242 (1963) 17

Ferri v. Ackerman, 444 U.S. 193, 100 S.Ct. 402 (1980) 14

Fortune v. Mulherrin, 533 F.2d 21 (CA 1, 1976) 18

Hanna v. Home Ins. Co., 281 F.2d 298 (CA 5, 1960) 18

Harbolt v. Carpenter, 536 F.2d 791 (CA 8, 1976) 15

Healy v. Ratta, 292 U.S. 263, 54 S.Ct. 700 (1934) 14

Hill v. McClellan, 490 F.2d 859 (CA 5, 1974) 18

Johnston v. Byrd, 354 F.2d 982 (CA 5, 1965) 15

Key v. Keady, 429 U.S. 1023, 97 S.Ct. 641 (1976) 3

Key v. Wise, 341 So.2d 1326 (Miss. 1977) 4, 5, 6, 10, 11, 12

Key v. Wise, 629 F.2d 1049 (CA 5, 1980) 5

Lucas v. Hope, 515 F.2d 234 (CA 5, 1975) 15

McLendon v. McGee, 198 So. 725 (Miss. 1940) 12

Manderville v. Canterbury, 318 U.S. 47, 63 S.Ct. 472 (1943) 15

Mike Hooks, Inc. v. Pena, 313 F.2d 696 (CA 5, 1963) 16

Olivares v. Martin, 555 F.2d 1192 (CA 5, 1977) 18

PPG Industries, Inc. v. Continental Oil Company, 478 F.2d 674 (CA 5, 1967) 9

Pan American Petroleum Corp. v. Superior Court of Delaware, 366 U.S. 656, 81 S.Ct. 1303 (1961) 14

Popp v. Eberlein, 409 F.2d 309 (CA 7, 1969) 15

Quates v. Griffin, 239 So.2d 803 (Miss. 1970) 5, 6

Stoll v. Gottlieb, 305 U.S. 165, 59 S.Ct. 134 (1938) 17

Wiener v. Shearson, Hammill & Co., Inc., 521 F.2d 817 (CA 9, 1975) 9

Will v. Calvert Fire Insurance Co., 437 U.S. 655, 98 S.Ct. 2552 (1978) 9

Williams v. Tooke, 108 F.2d 758 (CA 5, 1940) 18

STATUTES

28 U.S.C., §1346 13, 15

28 U.S.C., §1402 13

28 U.S.C., §2409 13

Miss. Code of 1972, §11-17-31 11

Miss. Code of 1972, §15-1-13 5

Miss. Code of 1972, §15-1-19 5

SECONDARY AUTHORITIES

Griffith, Miss. Chancery Practice, §113 11

Griffith, Miss. Chancery Practice, §115 12

CORRECTION OF INACCURACY AND OMISSION IN THE STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

Respondent takes issue with petitioner's statement of the questions presented for review, because same is inaccurate in some respects, misleading on others, and incomplete overall.

Petitioner's statement refers to the action as a suit to "quiet title" to the land. This is incorrect. The suit was one selectively to remove specific clouds upon the title arising from the invalid claims of private parties, limited to the named members of the Key family, and the Supreme Court of Mississippi expressly so held. The significance of this fact will be discussed later. (Opinion of Miss. S.Ct., first paragraph, App. 67)

The statement refers to "abstention" but fails to mention that this equity suit was merely abated and then only on the court's own motion, without request by any party. (App. 39-40, 40, 46-47)

The statement that the state court suit "did not come up to the standards of federal court suits" is misleading and designed to prejudice the Court. The state suit was fully and fairly tried. (Opinion of Miss. S.Ct., third paragraph, App. 67)

The statement is incomplete, because it fails to include any reference to the question of jurisdiction *in fact* or to the submission, without reservation, of that issue to the state court. The statement of the questions presented should be expanded to include the following:

> Did the state court have jurisdiction, *in fact*, to decide land title issues among the private litigants, in a case in which the United States was not a party (App. 67-69) and in which the rights of the United

States were expressly preserved (App. 46-47, 67-69), and were not prejudiced, - especially when the United States did not object to the exercise of jurisdiction by the state court. If not, was the state court judgment nevertheless entitled full faith and credit when that court determined its own jurisdiction, after that issue was submitted to it without reservation and when the jurisdictional issue was actually litigated and expressly decided. (App. 67-69)

STATEMENT OF THE CASE

The litigation commenced on July 21, 1972, when Key filed in the United States District Court (Judge William C. Keady) a Complaint seeking to have that court adjudicate a land title and to oust Wise from possession of the tract of land in Humphreys County, Mississippi. Key joined the United States as a defendant because it owned a levee easement. The private litigation between Key and Wise has now been ongoing for nine years.

The matter came about in this way. In 1972, Judge Keady scheduled a hearing on whether diversity jurisdiction existed in the face of transfers alleged to have been fraudulent. At the hearing on November 21, 1972, the U. S. Attorney noted that Congress had just passed a statute which dealt with jurisdiction when the United States was a party-defendant to real estate litigation. On reviewing the new statute, Judge Keady decided that the District Court had jurisdiction but that there were no federal questions involved on the merits. Judge Keady then ordered, *on his own motion*, a stay of the proceedings to allow time for the "private litigants" to obtain settlement of the local land title issues in the state courts. (App. 39-41)

Wise, in this situation, set about to carry out the express wishes of Judge Keady, as set forth in his stay order, and initiated a suit in the Chancery Court of Humphreys County, Mississippi, which ultimately made its way to the Supreme Court of Mississippi.

That suit did not name the United States as a party. The United States did not object. No effort was made by the United States to intervene. No move was made by the United States to enjoin or halt the state court proceedings or to remove that case to the federal court. Wise did not question the title of the United States to its easement. The United States was never party to the the state court litigation between the Keys and the Wises. The stay was reconsidered by Judge Keady on Key's motion and then reaffirmed. The Court directed that the Chancery Court suit should proceed and that this would be "without prejudice to the ultimate determination as to the rights and interests claimed by the United States in the real property involved in said litigation." (App. 46-47)[1]

On appeal to the Supreme Court of Mississippi, Key filed numerous assignments of error by which, under Mississippi law, issues are submitted for review and decision. Assignments by Key, numbered 1, 2 and 4, specifically tendered for review and decision the question of the state court's jurisdiction to try the case and render a judgment on the issues presented, including the specific question whether the United States was a necessary party. The assignments that tendered these issues without reservation are reproduced in the footnote.[2]

---

[1] Key appealed to the Fifth Circuit (No. GC-72-81-I). The Court declined to stay the state court proceedings and dismissed the appeal. (Order filed 6-13-73, Judges Wisdom and Ainsworth) Key filed petition for mandamus. (No. 76-2394) The Court denied. (Order filed 5-28-76, Judges Godbold, Dyer and Roney) Petition for rehearing was denied. (Order filed 7-6-76) The petition for mandamus was coupled with the alternative prayer for an injunction against Wise from proceeding in the state court. (App. 55) This also was denied along with the writ of mandamus. (Order filed 7-6-76) For Orders, see App. 47, 64, 65. The Supreme Court declined to grant certiorari. *Key v. Keady*, 429 U.S. 1023, 97 S.Ct. 641 (1976). (App. 66)

In tendering these issues for adjudication, Key attached no condition and made no reservation whatsoever. Absolutely none. Instead, the two issues tendered by Key's assignments ("jurisdiction" and "necessary parties") were argued extensively and the state court was urged to decide those issues, - albeit in favor of Key.

The Supreme Court of Mississippi responded to the issues, so thus unreservedly tendered, by a comprehensive opinion by which it was held that the United States was not a party and that the Court had jurisdiction to adjudicate the title as between the private parties before the Court. The decree of the trial court was affirmed. *Key v. Wise*, 341 So.2d 1326 (1977). (App. 67-69)

Key did not file an appeal to the Supreme Court of the United States and did not file a petition for the writ of certiorari for review of the decision of the Supreme Court of Mississippi.

---

2. "1. The Trial Court erred in failing to hold that the federal courts have the exclusive original jurisdiction to try this case, and therefore that the Mississippi State Courts have no jurisdiction thereof."

"2. The Trial Court erred in refusing to hold that the Mississippi Chancery Court had no jurisdiction to try this case, because there is pending a previously filed suit between the same parties, involving the same issues, in another court of competent jurisdiction, The United States District Court for the Northern District of Mississippi, Greenville Division."

"4. The Trial Court erred in failing to hold that the Chancery Court had no jurisdiction to try this case because (1) all necessary parties, including the United States, were not parties to this suit; (2) there was no oath to this quiet title suit, that all parties having an interest in the lands in question had been made parties, so far as known to complainants; and (3) the complaint did not deraign title in this suit to all necessary and interested parties."

Instead, Key ignored the appeal process and did nothing until Wise later filed the plea of res judicata in the federal district court, requesting dismissal of that suit, as it applied to Wise, citing the unappealed final judgment of the Supreme Court of Mississippi. Key then moved the federal court to retry the case and "decide issues on record adduced in state court", again advancing arguments rejected by the state court after the issues were there tendered (App. 75-80), but offering nothing new.

The District Court sustained the plea of res judicata, thereby according full faith and credit to the final judgment of the state court, and denied Key's motion for a re-decision on the state court record. (App. 81-82) Key appealed to the Fifth Circuit, where the case was affirmed. (App. 83-124)[3] After a poll of all of the judges on that Court, Key's petition for re-hearing was denied. (App. 125) The present petition for a writ of certiorari followed.

To complete the background review, we touch briefly on the merits. Mississippi has an ancient statute by which one may acquire title to Mississippi real estate by "adverse possession". Title becomes vested when one is in possession for as long as ten years, claiming ownership. (Section 15-1-13, Miss. Code of 1972) Another ten-year possession statute vests title in a mortgagee in possession. (Section 15-1-19, Miss. Code of 1972)

Under Mississippi land law, one may hold possession through an attorning tenant on the land, even when the tenant is a former co-owner of undivided interests.[4]

---

[3] Serious errors and omissions occur in petitioner's reproduction in the Appendix of the opinion of the Fifth Circuit, especially at page 111, where a substantial portion is omitted, and at page 114, where a phrase is omitted and a foreign phrase is inserted. Therefore, reference is made to the published version, *Key v. Wise*, 629 F.2d 1049 (CA 5, 1980).

[4] See *Quates v. Griffin*, 239 So.2d 803 (Miss. 1970), cited in the opinion (341 So.2d at 1327).

The facts in this case established title in Wise under Mississippi law. Indeed, the essential facts are documented and indisputable. Prior to 1939, it developed that many of the old records had been lost and then the principal actors were dead at the time of trial. The result was that proof of adverse possession, as by rental contracts and public agricultural records, was fragmentary prior to 1939. (State R. 292, 688, 689) However, from 1939 until 1972 (suit date) there is an overwhelming abundance of proof, both testimonial and documentary, that Tom Key was an acknowledged attorning tenant of Wise, paying rent from year to year (33 years), and that Wise openly exercised numerous acts of ownership over the land and that all of the Keys were aware of this. After reviewing this massive evidence, the Supreme Court agreed that Wise had held possession under claim for more than "31 years" and that the Key claims currently asserted were barred. 341 So.2d at 1327. This was over three times the necessary time period for vesting title under Mississippi law.

Accordingly, the court adjudicated that the true legal title belonged to Wise and that the claims of Key be cancelled as clouds on the Wise title. The relief requested was declaratory and equitable and the adjudication was final. (App. 48-54, 67-69)

SUMMARY OF THE ARGUMENT

In specific response to the arguments made in the Petition, respondent makes four points. *First*, abatement or "abstention" is not a viable issue. *Second*, the case was fully and fairly tried in the state court on all issues. *Third*, the state court *correctly* decided that it did, in fact, have jurisdiction to decide upon the merits as between the private parties before that court. The intent of Congress in enacting the "quiet title" jurisdictional statute was not to afford a federal forum to a private litigant, and the United States has not been denied a federal forum. *Fourth*, the judgment of the state court is res judicata and no authority is cited for withholding full faith and credit from the state court adjudication.

Abatement, whether right or wrong, was a procedural determination made at an early date by the United States District Court on the Judge's own motion, without a request by any party. That Court did not see fit to reconsider its action but emphasized in an order that same was "without prejudice to the ultimate determination as to the rights or interests claimed by the United States in the real property involved in said litigation". (App. 46) The Fifth Circuit declined to vacate the abatement on appeal (App. 47) and on petition for a writ of mandamus. (App. 64) This Court declined to review on petition for certiorari. (App. 66) The proceeding in the state court, therefore, continued without interruption and ultimately resulted in a final judgment on the merits of the controversy as between the private litigants. That judgment is now res judicata. After nine years of litigation, it is too late to re-argue the propriety of the procedural stay in an effort to start all over again. No authority has been cited whereby an alleged error in a stay order has been used to override the res judicata effect of a final judgment on the merits of a case.

The case was fully and fairly tried in the state courts. The remark in the Fifth Circuit opinion that "The findings and conclusions of the state trial court in this case would not pass muster in the federal system" was a comment only upon the absence of the degree of specificity which a federal appeals court prefers to see in the articulation of findings by trial courts. The Supreme Court of Mississippi observed in its opinion that the case was "well tried", and this must be so, because when Key went back to the federal district court, he asked not for a new trial but rather a re-decision on the basis of the record (six volumes) made in the state court. (App. 75-76)

The state court correctly decided that it did in fact have jurisdiction. (App. 67-69) The parties before that court were private parties and the issues were local and private and there were no federal merits issues involved. That court was careful to point out that the United States was not a party and that its rights were not adversely affected. (App. 69) The Court correctly held that it had the right to exercise its traditional jurisdiction to resolve land title disputes among private parties in actions where the United States was not named as a party defendant.

The state court had jurisdiction to determine its own jurisdiction. The issue was tendered to that court without reservation. By assigning error and seeking to have the state court decide the point, albeit in his favor, Key submitted the issue for that court's decision. The issue so thus tendered was fully litigated and then expressly decided. Key now seeks to have the federal court ignore that decision and start the lawsuit all over again, but there must be some place to end litigation, and that place was reached when the Supreme Court of Mississippi addressed all issues, including the one tendered on jurisdiction, and resolved those issues by its final judgment, - from which no appeal was taken to or request for review filed with the Supreme Court of the United States. The present attack is, therefore, collateral only, and is precluded by the full faith and credit which is due the final judgments of state courts of last resort.

ARGUMENT

POINT I

Abatement or "Abstention" Is Not a Viable Issue

Key complains of the "abstention" order. Whether technically this order was appropriate at the time is a question which can hardly survive the nine years of subsequent litigation which has become an accomplished fact. If the issue has any remaining vitality, the fact is that this is a purely equity case, seeking declaratory and incidental equitable relief, and the stay without dismissal was discretionary. Cf. *Will v. Calvert Fire Insurance Co.*, 437 U.S. 655, 98 S.Ct. 2552 (1978). Also: *PPG Industries, Inc. v. Continental Oil Company*, 478 F.2d 674 (CA 5, 1967); *Wiener v. Shearson, Hammill & Co., Inc.*, 521 F.2d 817 (CA 9, 1975). In any case, Wise should not suffer an adverse effect from this, - especially since the district court acted entirely on its own motion and all issues have now been fully litigated and adjudicated.

Finally, there is no authority to support the view that an "error" in abstaining is to be perpetrated forever to destroy the res judicata effect of a final judgment ultimately entered on the merits of the case, - especially when the party who ultimately prevails on the merits had no hand at all in the decision to abate the proceedings.

POINT II

The Case Was Fully and Fairly Tried on All Issues

As previously noted, all issues were submitted to the state court for its decision, including the issue of the court's own jurisdiction. Addressing the trial on the merits, the Supreme Court of Mississippi observed in its opinion:

> "A great deal of evidence, oral and documentary, was submitted to the Chancellor by both sides, resulting in a six volume record in this Court. From this record it appears that the case was well tried and it has been thoroughly briefed and argued here." (341 So.2d at 1326) (App. 67)

Indeed, Key concedes that the case was fully and fairly tried because when Key, dissatisfied with the decisional results, went back to the federal court, he requested not a new trial or even a supplemental trial but that the District Court "decide the issues on state court record". (App. 75-76) His complaint was not that the case was not "well tried" but only that it was not well decided on its merits, - a not uncommon complaint but one traditionally foreclosed by res judicata.

POINT III

The State Court Correctly Decided That It Had Jurisdiction in Fact

Apart from the *res judicata* inherent in the decision of the jurisdictional issue by the Supreme Court of Mississippi, and apart from the full faith and credit due the judgment of that Court, the fact is that the jurisdiction issue was correctly decided by the state court.

As previously noted, the jurisdictional issue was submitted by Key to the state courts for decision. Expressly addressing and deciding that very issue, in view of the nature of the action and the absence of the United States as a party, the Supreme Court of Mississippi held that it had jurisdiction to entertain the action and grant relief as among the private parties before the Court, concluding:

> "In the present case there is no 'interest claimed by the United States' which is controverted by the Wises and the United States is not a party. The quoted statute does not apply in disputes between private parties as to the private ownership of land or deprive the Mississippi courts of jurisdiction of litigation involving the interests of private persons in Mississippi real estate.
>
> "In the Keys' United States District Court suit the district judge declined to proceed and entered an order holding it in abeyance pending the outcome of the present litigation between the Keys and the Wises. Upon final determination of this suit the District Court doubtless will proceed with the disposition of the Keys' suit in which the United States is a defendant." (341 So.2d at 1327) (App. 67-69)

Now, in Mississippi, there are two kinds of suits through which titles to real property may become involved. One is called a "cloud removal" action; the other is a suit to "quiet or confirm title".

In the "quiet title" action, the design is to free the title from all claims from all sources, and to accomplish this, everyone claiming an interest must be parties. *Griffith, Miss. Chancery Practice,* §113 (1950).

Then, by statute there is the provision for "Removing Clouds upon Titles", §11-17-31, Miss. Code of 1972 (copy attached) under which a complainant may sue anyone, selectively, who pretends to have a right which "may cast doubt, or suspicion on the title of the real owner". This suit is one to have "such cloud, doubt or suspicion removed from said title". Under this "cloud removal" action, the subject matter is not purification of the title as such but rather only the removal of existing specific clouds upon it. Nothing more. Only those who are selected by the complainant are indispensable parties, because the rights of others are left unimpaired. *Griffith, Miss. Chancery Practice,* §115 (1950). See *McLendon v. McGee,* 198 So. 725 (Miss. 1940). It is also settled under Mississippi law that the presence of a non-joined party is not required, just because the non-joined party might be subject to a cross-claim by a co-defendant. *Calcote v. Wise,* 68 So.2d 477 (Miss. 1953).

In the case at bar, the suit in the Chancery Court was by "Original Bill of Complaint to Cancel Clouds on Title".

The question of the nature of the suit and the presence or absence of necessary parties was presented to the Supreme Court in connection with the question of the Court's jurisdiction.

The Court concluded that the appeal was from a decree cancelling Key's claims "as 'doubts, clouds or suspicions' upon the title of appellees, Louis J. Wise, and others thereto". It also held that the litigation was one involving "the interests of private persons" and that the United States was not a party. (341 So.2d at 1327) (App. 67-69)

The Supreme Court of Mississippi was competent to structure the lawsuit as to parties and issues and was competent to hold, as it did, that the lawsuit was one to remove clouds and not one to quiet title; that all indispensable parties were before the court; that the United

States was not a party and that the suit was a private one between private parties. Therefore, the state court not only had the right to determine its own jurisdiction, right or wrong, but correctly determined that issue.

There is nothing in Public Law 92-562, codified as 28 U.S.C., §2409(a)-(g), 1402(d), and 1346(f), which is in anywise at odds with this result, because the federal statute is expressly tied to actions in which the United States is named as a "party defendant". (See App. 36-38)

The operative section is 28 U.S.C., §2409(a), to which the other two sections specifically refer. It provides in pertinent part as follows: (App. 37)

> "The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights . . . ." (28 U.S.C., §2409(a))

It is found in Chapter 161, 28 U.S.C., entitled "United States as Party Generally". It says that the United States "*may be*" named as a "*party defendant*". If it disclaims "interest therein adverse *to the plaintiff*", then "jurisdiction of the district court shall cease". (subsection d)

The federal statute is activated only in a case where the United States becomes a "party defendant". Its purpose is to assure to it a federal forum in "quiet title suits *against the United States*". Cf. *California v. Arizona,* 99 S.Ct. 919 (1979). The United States has never yet been challenged in the state court action. It was not called upon to assert or to disclaim any interest adverse to Wise, because Wise, having a state law right to challenge specific claims on title, did not call the easement title of the United States into question.

The state court surely had the right to try local land disputes between private parties. In so doing, that court had the right to decide the case without prejudice to the United States, as it did, and to determine the question of the nature of the action and the identity of necessary parties, as it also did. After addressing and adjudicating upon these matters, it decided the "cloud" issues between Key and Wise. This, we submit, did not interfere with the federal court's jurisdiction or deny to the United States its day in federal court with Key. Preemption of jurisdiction is not to be presumed. Cf. *Pan American Petroleum Corp. v. Superior Court of Delaware*, 366 U.S. 656, 81 S.Ct. 1303 (1961). The right of a state to create a cause of action and define its scope, so long as it does not conflict with federal law, is clear. Cf. *Ferri v. Ackerman*, 444 U.S. 193, 100 S.Ct. 402 (1980), headnote No. 1.

In *Healy v. Ratta*, 292 U.S. 263, 54 S.Ct. 700 (1934), the Court said:

> ". . . Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined. . . ." (54 S.Ct. at 703)

There is no evidence in the legislative history of the 1972 enabling act or elsewhere to indicate that Congress intended to do more than to afford to the United States a federal forum in which to try quiet actions brought against the United States, when the plaintiff disputed the title claim of the United States. It was not the intent to provide a federal forum to private litigants in which to try local land title disputes between themselves, especially since controversies over title to land within a state are particularly appropriate for determination by the courts of that state. See *Lucas v. Hope*, 515 F.2d 234 (CA 5, 1975); *Johnston v. Byrd*, 354 F.2d 982 (CA 5, 1965); *Popp v. Eberlein*, 409 F.2d 309 (CA 7, 1969).

In the instant case, Wise sued Key in the state court. Wise did not sue the United States. Wise had no dispute with the United States. Wise invoked no federal right whatever. The Complaint was so cast as to assert the right to have the Court remove the private Key claims as illegal claims against the Wise title, as measured by state land law statutes and common law principles. Expressing the self-evident, it has been held that no jurisdiction is conferred under the "United States as defendant" statute, 28 U.S.C., §1346, unless the United States is named by the plaintiff as a defendant. *Harbolt v. Carpenter*, 536 F.2d 791 (CA 8, 1976), headnote No. 2, footnote No. 1. The state court had jurisdiction to determine its own jurisdiction and did so correctly.

Finally, there was no exclusive "in rem" jurisdiction. There was no unseemly conflict between the two courts, even in the absence of the stay order. It has long been settled law that in suits to adjudicate the interest of the parties in land, there is no exclusive jurisdiction on an "in rem" theory, because there is no compulsion for a court to take the land into its possession. It was expressly so held in *Manderville v. Canterbury*, 318 U.S. 47, 63 S.Ct. 472 (1943).

POINT IV

The Judgment of the State Court Is Res Judicata and Entitled to Full Faith and Credit

We have submitted that the decision of the Mississippi Supreme Court was clearly correct. But, correct or not, the decision most certainly cannot be viewed as arbitrary.

That Court had the jurisdiction to determine its own jurisdiction to try the merits of the controversy, and its jurisdictional decision on the issue tendered and litigated between the private parties before the Court is now *res judicata* along with all of the other issues tendered for decision.

In *American Surety Co. v. Baldwin*, 287 U.S. 156, 53 S.Ct. 98 (1932), the Court reaffirmed that the principles of *res judicata*, along with the full faith and credit clause of the Constitution, apply to questions of jurisdiction as well as to other issues. The Court said:

> "The full faith and credit clause, Const. art. 4, §1, together with the legislation pursuant thereto, applies to judicial proceedings of a state court drawn in question in an independent proceeding in the federal courts. Act of May 6, 1790, c. 11; Act of March 27, 1804, c. 56, §2, Rev. Stat. §905 (28 USCA §687) Mills v. Duryee, 7 Cranch, 481, 3 L.Ed. 411; Mutual L. Insurance Co. v. Harris, 97 U.S. 331, 336, 24 L.Ed. 959. Compare Bradford Electric Light Co. v. Clapper, 286 U.S. 145, 155, 52 S.Ct. 571, 76 L.Ed. 1026. The principles of res judicata apply to questions of jurisdiction as well as to other issues. Baldwin v. Iowa State Traveling Men's Ass'n, 283 U.S. 522, 51 S.Ct. 517, 75 L.Ed. 1244. . . ." (53 S.Ct. at 101)

In *Mike Hooks, Inc. v. Pena*, 313 F.2d 696 (CA 5, 1963), this Court stated the rule as follows:

> ". . . Likewise, it is now clear, that if the jurisdiction of a tribunal is actually brought into question in the proceeding before it, such tribunal has the power to determine its own jurisdiction, and once determined, whether right or wrong, that decision cannot ordinarily be attacked collaterally. . . ." (313 F.2d at 699)

In the case of *Durfee v. Duke,* 375 U.S. 106, 84 S.Ct. 242 (1963), the Court held that the rule applied to questions of subject matter jurisdiction as well as to in personam jurisdiction. The only specification for application of the rule is whether the issue of jurisdiction was litigated and decided. The Court held:

> ". . . From these decisions there emerges the general rule that a judgment is entitled to full faith and credit - even as to questions of jurisdiction - when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment." (84 S.Ct. at 245)

Key objected to the state court proceedings on jurisdictional grounds, and the issue of the state court's jurisdiction was fully litigated, in the light of the objections, in the state court. Having lost the issue there, along with the merits issues which were also fully litigated, Key seeks a second trial and a second decision on the very same issues by the federal court. This simply will not do. As put by the Court in *Stoll v. Gottlieb,* 305 U.S. 165, 59 S.Ct. 134 (1938):

> "Courts to determine the rights of parties are an integral part of our system of government. It is just as important that there should be a place to end as that there should be a place to begin litigation. After a party has his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined. There is no reason to expect that the second decision will be more satisfactory than the first." (59 S.Ct. at 138)

Since the jurisdictional issue was fully litigated in the Chancery Court and, on appeal, in the Supreme Court of Mississippi, and there decided, the issue is res judicata and the judgment of the state court is entitled to full faith and credit.

Finally, since Key took no appeal to the Supreme Court of the United States from the decision of the Supreme Court of Mississippi, the case now comes to this court as a collateral attack through the lower federal courts, which have no jurisdiction to review, reverse or modify the judgment of a state court. See: *Williams v. Tooke,* 108 F.2d 758 (CA 5, 1940); *Hanna v. Home Ins. Co.,* 281 F.2d 298 (CA 5, 1960); *Hill v. McClellan,* 490 F.2d 859 (CA 5, 1974); *Fortune v. Mulherrin,* 533 F.2d 21 (CA 1, 1976); *Olivares v. Martin,* 555 F.2d 1192 (CA 5, 1977). Having chosen not to pursue his alleged federal claim by an appeal to the Supreme Court of the United States, Key has as effectively concluded his litigation as if he had proceeded through the highest tribunal available to him. He cannot begin all over again on the same issues. *Angel v. Bullington,* 330 U.S. 183, 67 S.Ct. 657 (1947).

CONCLUSION

None of the specifications of Rule 17 appear in this case. The case involves only the application of long established and well understood doctrines, such as res judicata, full faith and credit, collateral attack on state court judgments and jurisdiction to determine jurisdiction. No decisional conflicts are cited and no important questions of federal law require settlement by this Court.

The Fifth Circuit reached the right result and the petition, we submit, should be denied.

Respectfully submitted,

VARDAMAN S. DUNN
Counsel of Record for Individual Respondents
Post Office Box 1046
1741 Deposit Guaranty Building
Jackson, Mississippi 39205
Telephone (601) 354-3783

MISSISSIPPI CODE (1972)

§ 11-17-31. Removing clouds upon titles.

When a person not the rightful owner of any real estate, shall have any conveyance or other evidence of title thereto, or shall assert any claim, or pretend to have any right of title thereto, which may cast doubt, or suspicion on the title of the real owner, such real owner may file a bill in the chancery court to have such conveyance or other evidence or claim of title cancelled, and such cloud, doubt or suspicion removed from said title, whether such real owner be in possession or not, or be threatened to be disturbed in his possession or not, and whether the defendant be a resident of this state or not. Any person having the equitable title to land may, in like cases, file a bill to divest the legal title out of the person in whom the same may be vested, and to vest the same in the equitable owner. Any person holding or claiming under a tax title lands heretofore or hearafter sold for taxes may proceed hereunder in like manner and may include, as a defendant, any political subdivision of the state, having or asserting any evidence or claim of title adverse to such tax title.

Opposition

2

Office - Supreme Court, U.S.
FILED
SEP 30 1981

No. 81-187

In the Supreme Court of the United States

OCTOBER TERM, 1980

ALF KEY, ET AL., PETITIONERS

v.

LOUISE P. WISE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

REX E. LEE
Solicitor General

CAROL E. DINKINS
Assistant Attorney General

JACQUES B. GELIN
NANCY B. FIRESTONE
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether a state court decree, rendered after federal court abstention, must be given preclusive effect when the federal district court had exclusive jurisdiction of the plaintiff's quiet title action against the United States and others, especially where it is conceded that the "findings and conclusions of the state trial court in this case would not pass muster in the federal system" and the plaintiff has not willingly agreed to the state court determination.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 2

Statute involved 2

Statement 2

Discussion 9

Conclusion 13

TABLE OF AUTHORITIES

Cases:

Allen v. *McCurry*, 449 U.S. 90 11

California v. *Arizona*, 440 U.S. 59 10

Durfee v. *Duke*, 375 U.S. 106 8

England v. *Louisiana State Board of Medical Examiners*, 375 U.S. 411 .... 5, 9, 10, 11

Gardner v. *Price*, 197 Miss. 831, 21 So. 2d 1 6

Lambert Run Coal Co. v. *Baltimore & O.R.R.*, 258 U.S. 377 5

Minnesota v. *United States*, 305 U.S. 382 5

Montana v. *United States*, 440 U.S. 147 11

United States ex rel. Robinson v. *Johnston*, 316 U.S. 649 13

Will v. *Calvert Fire Insurance Co.*, 437 U.S. 655 12

Page

Statutes and rule:

Act of Oct. 25, 1972, Pub. L. No. 92-562,
86 Stat. 1176 (Quiet Title Act) 2, 3

Tucker Act, 28 U.S.C. 1346 .... 2, 3

28 U.S.C. 1346(a)(2) 7
28 U.S.C. 1346(f) 4, 8, 10

28 U.S.C. 1402 .... 2, 3

28 U.S.C. 2409a 2, 3, 5, 7, 8

28 U.S.C. 2409a(a) 4, 7

Miss. Code Ann. § 15-1019 6

Sup. Ct. R. 17.1(a) 13

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 81-187

ALF KEY, ET AL., PETITIONERS

v.

LOUISE P. WISE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 83-124) is reported at 629 F. 2d 1049. The opinions of the district court (Pet. App. 39-40, 81) are not reported. The orders of the district court dated November 28, 1972 (Pet. App. 40-41), and February 27, 1973 (Pet. App. 46-47), are not reported. The orders of the court of appeals dated June 12, 1973 (Pet. App. 47), May 24, 1976 (Pet. App. 64), and June 28, 1976 (Pet. App. 65), are not reported. The opinion of the Mississippi Chancery Court (Pet. App. 48-51) is not reported. The September 10, 1974 order of the Mississippi Chancery Court (Pet. App. 51-54) is not reported. The decision of the Mississippi Supreme Court (Pet. App. 67-69) is reported at 341 So. 2d 1326.

JURISDICTION

The judgment of the court of appeals was entered on November 5, 1980. A timely petition for rehearing was denied on May 1, 1981 (Pet. App. 125). The petition for a writ of certiorari was filed on July 24, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The Act of Oct. 25, 1972, Pub. L. No. 92-562, 86 Stat. 1176, amending 28 U.S.C. 1346, 1402 and adding 28 U.S.C. 2409a, appears at pages 36-38 of the petition.

STATEMENT

This case, which presents important questions regarding the interaction of state and federal courts, arises out of a title dispute to 451 acres of land located in Humphreys County, Mississippi. On July 21, 1972, petitioners, descendants of Alf Key and Carrie Cook Key, commenced this action in the United States District Court for the Northern District of Mississippi seeking a declaration of their rights to the disputed land and relying on diversity jurisdiction.[1] The complaint named as defendants members of the Wise family and the United States (Pet. App. 24-30).

The Keys alleged that Alf Key, Sr., had first entered onto the land in 1886 and had purchased the land in two successive sales in 1886 and 1912, for which deeds were recorded. The Keys alleged that members of their family had occupied and farmed the land continuously from 1886 until 1969, when Tom Key, Alf Key's son, was forced to leave the land due to illness. They charged that the Wises, without valid title, had improperly assumed ownership of the land following Tom Key's death in 1970, and had thereafter leased the land to others, collecting rents that rightfully belonged to the Keys. The Keys further alleged that the Wises' record title was void because it was based on an invalid tax sale. The complaint charged that in 1934 the Wises bought the land from their employee and relative, Louis Fischer, who in turn had purchased the land at a 1932 tax sale. The Keys asserted that the Mississippi Supreme Court had invalidated the tax sale and that the Wises' title was, therefore, void. With regard to the United States, the Keys alleged that easement interests acquired by the United States in 1961 and 1963 to construct a levee on the property were also invalid because the United States had purchased the easements from the Wises, who could convey no valid interest. The Keys sought a judgment declaring the Wises' interest in the property void and the United States' easements invalid or, in the alternative, they sought compensation for the easements (Pet. App. 29-30).

---

[1] Prior to initiation of the suit, the Key family members residing in Mississippi executed and recorded quitclaim deeds conveying whatever interest they had in the property to out-of-state family members, thus ostensibly creating diversity of citizenship between the named defendants and the family members on whose behalf the suit was brought (Pet. App. 24-30).

The Wises and the United States filed motions to dismiss. The Wises claimed that diversity jurisdiction was lacking because certain Key family members residing in Mississippi were indispensable parties and had to be joined, thereby destroying diversity (Pet. App. 30-31 33-36). The United States contended that it had not consented to suit to quiet title and that to the extent the action was proper under the Tucker Act, 28 U.S.C. 1346, it was barred by the applicable six-year statute of limitations (Pet. App. 31-32).

Less than a month before the motions were set for hearing before the district court, the Quiet Title Act was enacted.[2] Act of Oct. 25, 1972, Pub. L. No. 92-562, 86 Stat. 1176, amending 28 U.S.C. 1346, 1402 and adding 28 U.S.C.

---

[2] The petitioners did not formally amend their complaint to rely on the Quiet Title Act until December 21, 1972 (Pet. App. 42).

2409a. The Act contains a waiver of the United States' sovereign immunity in suits to quiet title to land in which the United States claims an interest.[3] Another section of the Act provides that the federal district courts shall have *exclusive* jurisdiction over any quiet title action brought against the United States. That provision, 28 U.S.C. 1346(f), reads in pertinent part:

> The district courts shall have exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States.

The hearing on the motions to dismiss was held on November 21, 1972, at which time the Quiet Title Act was read to the district court. At the conclusion of the hearing, the district court stated that while it had jurisdiction pursuant to the Quiet Title Act to hear the case, it would defer ruling on the merits of the case pending resolution of the state property law issues in an appropriate state forum (Pet. App. 39-40). The court did not dismiss the federal action, but issued an abstention order, retaining jurisdiction pending the outcome of the not yet instituted state court suit (*id.* at 40-41).

The Keys moved for reconsideration of the abstention order before the district court in December 1972 (Pet. App. 43-46). Their request was denied on February 27, 1973 (*id.* at 46-47). The Keys then appealed to the Fifth Circuit. The Fifth Circuit dismissed the appeal on June 12, 1973 without opinion (*id.* at 47).

---

[3] 28 U.S.C. 2409a provides in pertinent part:

> (a) The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. * * *

In the interim, the Wises brought an action in the Chancery Court of Humphreys County, Mississippi, to cancel, as clouds on their claimed title, the quitclaim deeds recorded by the Keys in the 1970's and to adjudicate the Wises as the true owners of the property.[4] The Wises did not name the United States as a party.

At trial the Wises claimed that they had acquired title through adverse possession. Apparently, starting in the 1890's, the Wises began lending "furnish money" to the Keys to buy seed and farm supplies, for which the Wises took back deeds of trust on the property for security (Pet. App. 84). The Wises claimed that in 1932 the Keys had failed to repay a debt secured by a 1931 deed of trust and, as a consequence, the Wises entered the land in 1932 as "mortgagees in possession after condition broken" (*id.* at 87). Thereafter, the Wises contended, the Keys rented the property from the Wises. The Wises argued that the Keys' continued occupation of the land was for the Wises' benefit, who at the expiration of the 10-year statutory period under Miss. Code Ann. § 15-1-19, acquired the property through adverse possession (Pet. App. 87).

---

[4] The Keys could not file a state court action against the Wises, because such a suit would have by necessity involved the United States and would have triggered removal to federal court. Because that claim would fall within the exclusive original jurisdiction of the federal court, 28 U.S.C. 2409a, the district court would be constrained to dismiss the suit upon removal. See, *e.g.*, *Lambert Run Coal Co.* v. *Baltimore & O. R. R.*, 258 U.S. 377, 382 (1922); *Minnesota* v. *United States*, 305 U.S. 382, 389 (1939) (upon removal a federal court must dismiss a case falling within its exclusive jurisdiction if the case was first instituted in and then removed from a state court). Thus, as noted by the Fifth Circuit, "the Keys' hands were effectively tied by the federal court's abstention and by the possibility that the Wises might frustrate their lawsuit by seeking dismissal of a Key-filed state action by way of removal to the federal court" (Pet. App. 96 n.7). The Fifth Circuit also noted that the Keys could not counterclaim against the Wises in the state action "for fear that such a pleading in the state court would be construed as a waiver of their right to return to federal court at the conclusion of the state court lawsuit" (*id.* at 96). See *England* v. *Louisiana State Board of Medical Examiners*, 375 U.S. 411, 419 (1964).

The Wises further alleged they had established adverse possession through the deed acquired in 1934. The Wises did not dispute the Keys' contention that the 1945 Mississippi Supreme Court decision in *Gardner* v. *Price*, 197 Miss. 831, 21 So. 2d 1, rendered the tax sale to Fischer invalid. Rather, the Wises contended that regardless of whether the deed they had received from Louis Fischer in 1934 was valid, it was clear that after 1934 the Keys recognized the Wises as the true owners of the property and stayed on the land thereafter as the Wises' tenants (Pet. App. 88 & n.2).

On September 10, 1974, the Chancellor filed his formal findings and final decree awarding title to the Wises (Pet. App. 48-54). The Chancellor found that the "effect of the mortgage of February 5, 1931 * * * must be resolved against the defendants [Keys]" (*id.* at 50) and that the Wises by and through their predecessors in title "entered said lands in controversy with good and sufficient color of title and have there remained from the year 1932" (*id.* at 49-50). The Chancellor concluded: "In short, I find as a fact that complainants [Wises] have prevailed by that necessary degree of the credible evidence in the establishment of the allegations of their original bill" (*id.* at 51). The Chancellor declared that the property belonged to the Wises and ordered that the Keys' deeds be cancelled as clouds on the Wises' title (*id.* at 53-54).

Pending appeal to the Mississippi Supreme Court, the Keys petitioned the Fifth Circuit for a writ of mandamus directing the federal district court to exercise its jurisdiction to hear the federal case (Pet. App. 55-63). On May 24, 1976, the Fifth Circuit denied the petition without opinion (*id.* at

64). This Court denied certiorari without opinion on December 13, 1976 (*id.* at 66; 429 U.S. 1023).

On February 2, 1977, the Mississippi Supreme Court affirmed the decision of the Chancery Court (Pet. App. 67-69). The Mississippi Supreme Court upheld the Chancellor's determination that the Wises had entered the land under color of title in 1932 and had acquired title by adverse possession, and rejected the Keys' contention that under the Quiet Title Act the Mississippi courts lacked jurisdiction to hear the case (*ibid.*). The Mississippi Supreme Court determined that 28 U.S.C. 2409a did not apply because (1) the Wises did not claim any interest adverse to the United States and (2) the statute did not apply to disputes between private parties (Pet. App. 68-69).

Thereafter, the Wises sought dismissal of the Keys' federal lawsuit on the basis of res judicata (Pet. App. 70-71). In response, the Keys filed a motion to decide the issues on the state court record (*id.* at 75-80), accompanied by an affidavit from the Keys' counsel claiming the Mississippi trial judge was biased (*id.* at 72-75). The district court granted the motion to dismiss on September 7, 1977 (*id.* at 81-82). A divided court of appeals affirmed on November 5, 1980 (*id.* at 83-124), and on May 1, 1981, denied the Keys' motion for rehearing or, in the alternative, for rehearing en banc (*id.* at 125).

The court of appeals determined that the Mississippi Supreme Court's holding that it had jurisdiction over the action was not subject to collateral attack (Pet. App. 103) and concluded that the state court judgment was therefore entitled to res judicata effect (*id.* at 117).[5]

---

[5] The United States' contention on appeal was that the Keys' lawsuit sought compensation for land taken by the United States and as such could have been brought under the Tucker Act, 28 U.S.C. 1346(a)(2), and was thus barred by the applicable six-year statute of limitations. The argument was based on 28 U.S.C. 2409a(a) which states that "[t]his

The court recognized that under the terms of 28 U.S.C. 2409a and 1346(f) the federal courts were given exclusive jurisdiction over the Keys' entire action (Pet. App. 102-103) and that "[a]bstention * * * was clearly improper" (*id.* at 100). In addition, it recognized that the "policy against the Mississippi court acting beyond its jurisdiction * * * is strong" (*id.* at 102). It concluded, however, based on this Court's decision in *Durfee* v. *Duke*, 375 U.S. 106 (1963), that where it cannot be fairly said that the state's lack of jurisdiction over the subject matter of the action was clear and the jurisdictional issue was "actually litigated," the state court judgment is entitled to full faith and credit (Pet. App. 102).

The court went on to conclude that the Mississippi court judgment was entitled to preclusive effect because it did not present any "special circumstance that warrants an exception to the normal rules of res judicata" (Pet. App. 117). The court distinguished this case from other cases where federal jurisdiction is invoked to resolve constitutional claims or other controversies governed by federal law on the grounds that this case "presents an unusual instance" where federal jurisdiction is invoked to "decide questions of state law" (*id.* at 111). The court determined that where only state law issues are involved, the need for federal court review is not compelling (*id.* at 112). In addition, the court determined that while the exclusive jurisdiction provision under the Quiet Title Act was intended to protect the government from defending suits in state courts, it did not create any rights for private parties (*id.* at 116). Accordingly, the court held that it could not re-examine the matter even though the

---

section does not apply to * * * actions which may or could have been brought under sections 1346 * * * [or] 1491 * * *." The court of appeals disposed of this argument in a footnote, stating that the relief sought in this case was to quiet title and that "§ 2409a was the proper statute under which to bring this lawsuit" (Pet. App. 116 n.11).

findings and conclusions of the state trial court "would not pass muster in the federal system" (*id.* at 114, 117).

Judge Brown dissented (Pet. App. 117-124). He disagreed with the majority's conclusion that this case did not present special circumstances warranting an exemption to the normal rules of preclusion. In Judge Brown's view (*id.* at 121) the case fitted "exactly *England* v. *Louisiana Board of Medical Examiners,* 375 U.S. 411 * * * (1964)" in which this Court stated that a "litigant who has properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims [cannot] be compelled, without his consent and through no fault of his own, to accept instead a state court's determination of those claims." *England, supra,* 375 U.S. at 415 (footnote omitted). The fact that federal jurisdiction was invoked here by the express terms of a statute rather than on a constitutional claim as in *England* was not dispositive, Judge Brown reasoned. In either case, Judge Brown stated, a litigant cannot be deprived of the "right to a full Federal trial—free of any inhibitions or external restraints, with an appeal to this Court"(Pet. App. 122). Judge Brown concluded that (*id.* at 123-124; emphasis in original):

> The clear congressional policy of §§ 2409a and 1346(f) was to require Federal Court determination of any state-law based claim drawing in question continued ownership of the United States. That was the precise basis of the Keys claim. The validity of the Key's [*sic*] claim ousting the United States could not be determined except by trial—which Congress ordained was to take place *exclusively* in the Federal Court.

DISCUSSION

1. The decision of the court of appeals is contrary to the principles established by this Court in *England* v. *Louisiana State Board of Medical Examiners,* 375 U.S. 411

(1964). The Court there stated (375 U.S. at 415; footnote omitted):

> There are fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims can be compelled, without his consent and through no fault of his own, to accept instead a state court's determination of those claims. Such a result would be at war with the unqualified terms in which Congress, pursuant to constitutional authorization, has conferred specific categories of jurisdiction upon the federal courts, and with the principle that "When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction . . . . The right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied." *Willcox* v. *Consolidated Gas Co.,* 212 U.S. 19, 40.

Based on these principles, the Court in *England* refused to give preclusive effect to a state court determination of England's constitutional claims.

Here, it is not disputed that the Keys properly invoked the jurisdiction of the federal courts. In *California* v. *Arizona,* 440 U.S. 59, 66-68 (1979), this Court expressly determined that 28 U.S.C. 1346(f) was intended to "confine jurisdiction [over quiet title suits against the United States] to the federal courts and to exclude the courts of the States." 440 U.S. at 66. In addition, it is not disputed that the Keys were unwillingly compelled to accept a state court determination of their claims. As outlined above, the Keys did everything possible to secure federal court review of their action. Yet, despite the exclusive review provision in the Quiet Title Act and the Keys' concerted efforts to obtain federal review, the court of appeals determined that it was bound by the Mississippi court's decision. The court of appeals concluded that the preclusive effect it accorded the state court decision was justified because this case, as opposed to *England* and others, involved matters of state law that did not warrant federal review (Pet. App. 112-117).

While the Keys' claims do not themselves rest on the Constitution, those claims and their disposition by the majority of the Fifth Circuit panel do involve federal law and raise substantial questions of federal court jurisdiction and the respective competency of state and federal court systems. Further, given this Court's concern over the fact-finding role of the federal courts in matters of federal jurisdiction, it is not at all clear that the *England* decision is limited to claims founded on the Constitution. The court of appeals simply ignored this Court's determination that "where, but for the application of the abstention doctrine, the primary fact determination would have been by the District Court, a litigant may not be unwillingly deprived of that determination," *England, supra,* 375 U.S. at 417 (footnote omitted), and this Court's conclusion that "[t]he possibility of appellate review by this Court of a state court determination may not be substituted, against a party's wishes, for his right to litigate his federal claims fully in the federal courts." *Ibid.*

The court of appeals' conclusion is all the more disturbing in view of its concession that the "findings and conclusions of the state trial court in this case would not pass muster in the federal system" (Pet. App. 114). In these circumstances, the propriety of giving the state court judgment preclusive effect is in serious doubt.[6]

---

[6] In addition to the reasons set forth above, the Keys' challenge to the extensiveness and fairness of the state court procedure (Pet. 8-15; Pet. App. 72-75) may also be a sufficient ground to deny preclusive effect to the state court judgment. While the court of appeals dismissed this contention in a footnote (Pet. App. 117 n.13), in *Montana* v. *United States,* 440 U.S. 147, 164 n.11 (1979), this Court stated that among the "special circumstances" that may warrant an exception to the normal

2. This view is further confirmed by the fact that the federal district court may not have had the power to abstain from hearing the case in the first instance. The court of appeals determined that abstention was improper in this case, but concluded that it did not have to decide whether the district court had the power to decline to hear a claim within the exclusive jurisdiction of the federal courts, because the Mississippi court's determination that it had jurisdiction was conclusive (Pet. App. 102).

In *Will* v. *Calvert Fire Insurance Co.*, 437 U.S. 655, 666 (1978) (emphasis added; footnote omitted), this Court implied that whether a federal court has the power to decline the exercise of exclusive federal jurisdiction is an open question, stating:

> Calvert contends that a district court is without power to stay proceedings, in deference to a contemporaneous state action, where the federal courts have exclusive jurisdiction over the issue presented. *Whether or not this is so,* petitioner has not purported to stay consideration of Calvert's claim for damages under the Securities Exchange Act of 1934, which is the *only* issue which may not be concurrently resolved by both courts.

In the instant case, the district court stayed consideration of the entire federal claim, pending resolution of the issues by a state court, even though the Mississippi courts were without any jurisdiction whatever to hear the case. In such circumstances, there is a serious question whether the state court decision should be given any preclusive effect. As Justice Brennan stated in dissent in *Calvert Fire Insurance Co., supra,* 437 U.S. at 674:

---

rules of preclusion are those where "there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation." See also *Allen* v. *McCurry*, 449 U.S. 90, 95 (1980).

To be sure, the preclusive effect of a state-court determination of a claim within the exclusive jurisdiction of the federal courts is an unresolved and difficult issue. See generally Note, Res Judicata: Exclusive Federal Jurisdiction and the Effect of Prior State-Court Determinations, 53 Va. L. Rev. 1360 (1967). For myself, I confess to serious doubt that it is ever appropriate to accord res judicata effect to a state-court determination of a claim over which the federal courts have exclusive jurisdiction; for surely state-court determinations should not disable federal courts from ruling *de novo* on purely legal questions surrounding such federal claims.

CONCLUSION

On this Court rests the prime responsibility for determining the proper roles of the federal and state judiciaries. Rule 17.1(a), Supreme Court Rules, specifically recognizes the appropriateness of the grant of certiorari in cases where the federal appellate decision "has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision." In our view, this is such a case and we accordingly join petitioners in urging the Court to grant certiorari. In light of this Court's applicable precedents, the Court may wish to consider summary reversal. Another possibility would be to remand this case for further consideration of the jurisdictional issues by the Fifth Circuit, which might appropriately be requested to rehear the case en banc. Cf. *United States ex rel. Robinson* v. *Johnston,* 316 U.S. 649 (1942).

Respectfully submitted.

REX E. LEE
Solicitor General

CAROL E. DINKINS
Assistant Attorney General

JACQUES B. GELIN
NANCY B. FIRESTONE
Attorneys

SEPTEMBER 1981